Supreme Court, U.S.
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No._____

In the
Supreme Court of the United States
October Term, 1995

Metropolitan Life Insurance Company,
Petitioner
v.
Robertson-Ceco Corp.,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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81 pp

QUESTIONS PRESENTED

1. Did the majority below err in applying "reasonableness" factors above and beyond its finding that there were systematic and continuous contacts between the defendant and Vermont in concluding that the Vermont district court lacked *general* jurisdiction over the defendant under the Due Process Clause of the United States Constitution?

2. Is the decision of the majority below in conflict with the decisions of other federal and state courts in defining the constitutional limits on *general* jurisdiction?

3. Did the majority below err in failing to use transfer of venue to ameliorate any concerns relating to the forum's fairness and litigation convenience rather than dismissal, once it determined that the defendant had constitutionally sufficient contacts with Vermont?

4. Did the majority below err in superimposing anti-forum shopping concerns in addition to the constitutional limitations on the exercise of jurisdiction established by this Court?

PARTIES TO THE PROCEEDINGS

The original parties to this lawsuit included: (1) Metropolitan Life Insurance Company; (2) Robertson-Ceco Corp.; and (3) United Dominion Industries, Inc. Summary judgment was granted in favor of United Dominion on March 14, 1995. It was not a party to the appeal below, nor is it an interested party here.

There is no parent company of the petitioner. Petitioner's subsidiaries (other than wholly owned subsidiaries) are these:

Blodgett Holdings, Inc.
Briggs Holdings, Inc.
Briggs Plumbing Products, Inc.
Cicero/Cermak Corporation
Cloverleaf Properties, Inc.
Coating Technologies International, Inc.
Dan River, Inc.
Frialator International, Limited
Genesis Seguros Generales, Sociedad Anonima
De Seguros Y Reaseguros
GS Blodgett Corporation
GS Blodgett Inc.
GS Blodgett International LTD.
Kolon-Met Life Insurance Company
Magikitch'N, Inc.
Metropolitan Lloyds Insurance Company of Texas
Metropolitan Structures
Metropolitan Structures, Inc.
Metropolitan Structures West, Inc.
Morguard Investments Limited
MS Management Services, L.P.
Pitco Frialator, Inc.
Santander Met, S.A. (Mexico)

Seguros Genesis, S.A. (Spain)
State Street Research Portfolios, Inc.

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Metropolitan Life Insurance Company respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 84 F.3d 560. (App., *infra*, 1a-35a.) The opinions of the district court are unreported. (App., *infra*, 36a-47a.)

JURISDICTION

The court of appeals entered its judgment on May 22, 1996. (App., *infra*, 1a.) The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Fifth and Fourteenth Amendments, United States Constitution. (App., *infra*, 48a-50a.)

STATEMENT OF THE CASE

In the late 1970's, Robertson-Ceco entered into a subcontract with Henry C. Beck for the installation of the exterior skin or curtain wall of the Flagship Bank (now, SunBank) Building in downtown Miami, Florida. Beck was general contractor to Raymond D. Nasher Co., a Texas developer and the original owner of the building, the construction of which was completed in 1981. Nasher later sold the building to MetLife, to which it assigned all of its rights.

Under its subcontract, Robertson-Ceco designed, manufactured, and installed more than a thousand laminated, composite panels. Although these assemblies were supposed to remain flat and intact, and retain their structural integrity, they began delaminating and deteriorating aesthetically and structurally. Some of the panels' outer sheets separated

from their cores, falling off the building. In order to prevent the danger posed by further deterioration, MetLife first mechanically fastened the panels to the building, then entirely enveloped the old curtain wall with a new one, incurring millions of dollars in damages.

On August 31, 1993, MetLife sued Robertson-Ceco in Vermont District Court on several theories, asserting diversity of citizenship jurisdiction. 28 U.S.C. § 1332(a). Robertson-Ceco is a Delaware corporation, and had its principal place of business in Massachusetts at the time suit was filed. MetLife is a New York corporation, with its principal place of business in that state. MetLife sued Robertson-Ceco in Vermont, one of many places where jurisdiction exists, to take advantage of its six-year statute of limitations.

Robertson-Ceco's Vermont contacts were and are legion, justifying the imposition of *general* personal jurisdiction there. The exhibits and deposition transcripts submitted to the district court showed that in the few years preceding the lawsuit, Robertson-Ceco (1) sold millions of dollars of its products in Vermont, (2) entered into continuing contracts with at least 13 Vermont construction companies, (3) furnished more than 149 prefabricate buildings throughout Vermont (in all 14 counties and at least 23 Vermont cities or towns), (4) issued hundreds of warranties to Vermont residents, (5) sent at least eight Robertson-Ceco employees to all of the state's 14 counties and at least 23 Vermont towns or cities on at least 162 occasions (exclusive of Vermont trips taken by six additional employees with undisclosed frequency and geographic range), (6) maintained an office, an employee, and records in Vermont, (7) leased and purchased equipment and materials and other goods and services from Vermont vendors, (8) maintained authority to do business in Vermont

with its secretary of state, (9) had a registered agent in Vermont, (10) continuously filed Vermont income, sales, and use tax returns, (11) had been sued in Vermont (not just in this lawsuit), (12) had availed itself of the Vermont judicial system by bringing an action there, and (13) had extensively solicited business and advertised in Vermont. (App., *infra*, 6a-7a.)

Robertson-Ceco moved to dismiss for lack of personal jurisdiction. In its amended order of dismissal, the district court found insufficient contacts to impose jurisdiction. The district court also cited "reasonableness factors," which the court ruled favored Robertson-Ceco. In footnote one of its first order, the district court openly reproached MetLife for selecting the Vermont forum because of its favorable statute of limitations (App., *infra*, 45a.)

On August 18, 1994, MetLife moved to reconsider, reiterating the significant contacts that were neither recognized nor addressed by the district court. Robertson-Ceco did not file a response to this motion, which was denied on September 16, 1994. (App., *infra*, 36a.)[1/]

In its May 22, 1996 opinion,[2/] the court of appeals rejected Robertson-Ceco's thesis (adopted by the district court) that *only* 1993 contacts were relevant to the "minimum

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[1/]In its order, the court incorrectly characterized its earlier order (dismissing Robertson-Ceco for lack of jurisdiction) as a summary judgment. (App., *infra*, 36a.) The order of dismissal of Robertson-Ceco became final on March 14, 1995, and notice of appeal was filed on April 12, 1995. The Second Circuit had jurisdiction over the appeal under 28 U.S.C. §1291.

[2/] Judge Walker filed a dissenting opinion. (App,, *infra*, 31a-35a.)

contacts" determination, and held that the district court "erred in mechanically limiting its jurisdictional inquiry to the year 1993." (App., *infra*, 15a.) The court then ruled that Robertson-Ceco's extensive Vermont contacts were sufficiently "continuous and systematic" so as to satisfy the exercise of general jurisdiction consistently with due process requirements. (App., *infra*, 31a.)

Notwithstanding Robertson-Ceco's substantial "minimum contacts"[3/] in Vermont and MetLife's offer to stipulate to a change of venue, a majority of the court of appeals affirmed the dismissal of Robertson-Ceco on the basis of the five-factor "reasonableness" inquiry of ***Asahi Metal Industry Co. v. Superior Court,*** 480 U.S. 102, 113 (1987), which the majority held was applicable in *general* jurisdiction cases and which it weighed in Robertson-Ceco's favor. The court based its conclusion on the lack of a relationship of the subject matter of the case to Vermont and the Vermont contacts of Metlife and Robertson-Ceco. Thus, although the majority clearly analyzed jurisdiction through the lens of *general* jurisdiction, it employed the additional "reasonableness" analysis of *specific* jurisdiction cases.

This petition for writ of certiorari followed.

REASONS FOR GRANTING THE PETITION

I. Certiorari Should Be Granted To Clarify The Respective Due Process Standards Applicable To The Assertion Of Specific And General Personal Jurisdiction,

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[3/] Although the court used the term "minimum contacts," a concept applicable to specific jurisdiction, the court expressly said it was thereby referring to Robertson's "'continuous and systematic' general business contacts."(App., *infra*, 30a-31a.)

As Well As To Harmonize This Court's Opinions In *International Shoe, Worldwide Volkswagen, Burger King, Asahi, Perkins* And *Helicopteros.*

Prior to this case, no United States court has ever dismissed a lawsuit for want of *general* personal jurisdiction, having first found that the defendant had constitutionally sufficient continuous and systematic contacts with the forum. In so doing, the majority below failed to follow this court's holdings in ***Perkins v. Benquet Mining Co.,*** 342 U.S. 437 (1952) and ***Helicopteros Nationales de Colombia, S.A. v. Hall***, 466 U.S. 408 (1984), confused certain standards applicable only to *specific* jurisdiction cases, and rendered a decision that essentially merges the "minimum contacts" analysis and the concept of *general* jurisdiction.

In contrast to "specific" jurisdiction, a court exercises "general" personal jurisdiction in a lawsuit that need not arise out of or be related to the defendant's contacts with the forum. ***Helicopteros***, at 414 n. 9. *General* jurisdiction has existed as a separate basis for jurisdiction at least since ***Perkins*** when the defendant's general business contacts with the forum are "continuous and systematic." ***Id.***, at 448. In that case, a Philippine corporation was sued in Ohio. The plaintiff was not an Ohio resident, and the claim sued on did not arise in Ohio and was unrelated to the business activities of the corporation in that state. On the basis of the corporation's continuous and systematic activities in the forum state alone, this Court determined that Ohio's exertion of jurisdiction offended neither federal due process, nor the strictures of ***International Shoe Co. v. Washington***, 326 U.S. 310 (1945).

In ***Helicopteros,*** the second of the two *general* jurisdiction decisions from this Court since ***International Shoe***, the majority expanded on *general* jurisdiction and

validated the dichotomy between it and *specific* jurisdiction. Specifically, the Court set out "to determine whether the nature of Helicopteros' contacts with the State of Texas . . . constitute[d] the kind of continuous and systematic general business contacts the Court found to exist in ***Perkins***." ***Helicopteros***, at 415-16.

In contrast to, and in conflict with ***Perkins*** and ***Helicopteros***, the majority below applied a bifurcated personal jurisdiction test, essentially extending to the *general* jurisdiction context a methodology derived from this Court's holdings in *specific* jurisdiction cases such as ***World-Wide Volkswagen Corp. v. Woodson***, 444 U.S. 286 (1980), and ***Asahi Metal Indus. Co. v. Superior Court***, 480 U.S. 102 (1987). The majority agreed that Metlife carried its burden of establishing *general* jurisdiction but then decided the case on *specific* jurisdiction principles, which the court termed a "reasonableness" test. Thus, the court held that although Metlife had satisfied the due process test for *general* jurisdiction, the exercise of that jurisdiction was unreasonable since the lawsuit neither arose in the forum, nor out of the contacts of the plaintiff or defendant with the forum. That ruling undermines the very essence of the distinction between *specific* and *general* jurisdiction and erodes the doctrinal foundation established in ***International Shoe Co.*** The majority below expressly recognized the absence of Supreme Court authority for the employment of a "reasonableness" test in a *general* jurisdiction case, such as this case. (App., *infra*, 23a.)

International Shoe did not separate the "minimum contacts" inquiry from that of "traditional notions of fair play and substantial justice." Rather, it deemed the establishment of "contacts" the very core of "fair play and substantial justice." In contrast to the principle articulated in ***International Shoe***, the majority below transformed the

concept of "traditional notions of fair play and substantial justice," defined in ***International Shoe*** only by the nature of the "contacts" of the defendant with the forum state, into a secondary test of "reasonableness" in addition to the continuous and systemic contacts present in a *general* jurisdiction case.[4/] .

Significantly, in ***International Shoe,*** the Court identified no independent reasonableness inquiry after finding constitutionally sufficient contacts. Nor has this Court ever considered whether such an independent inquiry is necessary in a *general* jurisdiction case, as distinguished from a *specific* jurisdiction case. This is the fundamental question that this Court should grant certiorari to decide.

The Court also should decide whether to inject into the jurisdictional analysis such sovereignty considerations as the interests of the plaintiff, the forum, and the interstate judicial system, and thereby to shift the focus away from the defendant's liberty interest. In ***Omni International v. Rudolf Wolff & Co.***, 484 U.S. 97, 104 (1987), this Court stated,

> [T]he requirement that a court have personal jurisdiction flows not from Art. III, but from the Due Process Clause. . . . It represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty.[5/]

[4/] As discussed in more detail in Part III below, once sufficient "contacts" are found in a *general* jurisdiction case, a second fairness reasonableness inquiry is unnecessary for purposes of due process, and the relevant inquiry becomes one of transfer of venue or *forum non conveniens.*

[5/] Importantly, ***International Shoe*** implicated only the interest of the defendant, not the interests of the plaintiff or the forum state. It made clear that the due process inquiry turns exclusively on the fairness to the

The Court should determine whether an independent inquiry into matters unrelated to the defendants liberty interest is necessary and proper in a *general* jurisdiction case, since the defendant's liberty interest already is protected by the requirement of continuous and systematic contacts with the forum.

That the majority below was led astray in applying these secondary "reasonableness" factors may be explained, in part, the apparent vacillation in the application of the appropriate due process standard in some of the recent *specific* jurisdiction cases. The holding of the majority below is based on dicta in a specific jurisdiction case, regarding a number of considerations other than fairness to the defendant, that may be considered in a jurisdictional inquiry in a limited number of cases. ***World-Wide Volkswagen***, at 292-93. Only two years after ***World-Wide Volkswagen***, however, this Court rejected this supplemental function of due process, again recognizing that the personal jurisdiction requirement "represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty." ***Insurance Corp. Of Ireland v. Compagnie des Bauxites de Guinea***, 456 U.S. 694, 702 (1982). This court explained that "[t]he restriction on state sovereign power described in ***World-Wide Volkswagen Corp.*** . . . must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause." ***Id.*** at 702-03 n. 10.

Notwithstanding this passage, the Supreme Court repeated the earlier ***World-Wide Volkswagen*** dictum in ***Burger King Corp. v. Rudzewicz***, 471 U.S. 462, 476-77

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defendant in being made to defend a suit in a particular forum. This presumably is because this Court believed due process safeguards liberty interests, not federalism.

(1985), and then in ***Asahi***, 480 U.S. at 113-15, by defining the test for *specific* jurisdiction to include both "minimum contacts" and "reasonableness" components. It is both the inconsistency in the direction of the Court's statements in these four cases and the Court's previous use of a second "reasonableness" component only in *specific* jurisdiction cases, that require clarification at this time. Guidance and synthesis are needed, not only as to what was meant by these pronouncements, but more critical to this case, a decision by this Court as to whether these proclamations have any relevance in a *general* jurisdiction case is necessary.

That a separate "reasonableness" inquiry is necessary only in a *specific* jurisdiction case seems fundamental. Unlike *specific* jurisdiction, the very essence of *general* jurisdiction is that although the cause of action typically is unrelated to the defendant's contacts with the forum state, the defendant has an ongoing relationship with the forum. ***Burger King***, at 473 n. 15. This is why in *general* jurisdiction cases, unlike *specific* jurisdiction cases in which only a single contact may be sufficient to impose jurisdiction, "continuous and systematic" contacts, ***Helicopteros***, at 415, or "substantial and continuous" contacts, ***Burger King***, at 487, are required. The presence of the requisite continuous and systematic contacts in a *general* jurisdiction case necessarily presumes fundamentally more substantial contacts than in the *specific* jurisdiction context and ensures "fair play and substantial justice," making a secondary "reasonableness" test unnecessary to the due process inquiry.

This distinction was ignored below, and the Second Circuit's affirmance of the dismissal is certain to have serious and important ramifications relative to the future of *general* jurisdiction. It is important that this Court speak to whether the interests of the forum and the plaintiff, as well

as other factors mentioned in ***Worldwide Volkswagen,*** have any relevance to due process analysis in the context of *general* personal jurisdiction. Until this matter is resolved by this Court, the holding below will be in conflict with ***Perkins*** and ***Helicopteros***, and foster yet more conflicting decisions. This Court should grant certiorari to clarify the general-specific jurisdiction dichotomy, and to elaborate on the constitutional standards relative to the assertion of each type of jurisdiction.

II. Certiorari Should Be Granted To Resolve A Conflict Between The Majority Below And Other Courts Of Appeals, As Well As With State Court Decisions On The Proper Due Process Standard To Be Applied In *General* Jurisdiction Cases.

The majority opinion below conflicts with those of other courts of appeals. For instance, the methodology employed by the Second Circuit in this case contradicts that used in ***Schreiber v. Allis-Chalmers Corp.***, 611 F.2d 790 (10th Cir. 1979). In that case, a Kansas plaintiff, seeking a longer statute of limitations, brought suit in a federal court in Mississippi for injuries sustained in Kansas in the operation of equipment purchased in Kansas and manufactured by the defendant in Wisconsin. Following a transfer of venue to the federal court in Kansas, the district judge dismissed the action for lack of general jurisdiction over the defendant in Mississippi. Although the corporation had appointed an agent to receive service and was involved in business in Mississippi, its contact there was wholly unrelated to the dispute, and the district court found the defendant's connection to the state was insufficient to satisfy the demands of due process. The Court of Appeals for the Tenth Circuit reversed and concluded that if a corporation is engaged in " continuous and systematic" activities in the

forum state, it does not violate due process to subject the corporation to suit there for any cause of action.

Reaching the same conclusion regarding the existence of jurisdiction, but with a fundamentally different methodology - one similar to that used by the majority below - the Louisiana Supreme Court expressly discussed the conflict in both the federal and state courts regarding the application of a secondary "reasonableness" test in the *general* jurisdiction context. In ***Reyes v. Marine Management Consulting, Ltd.***, 586 So.2d 103 (1991), the court reviewed whether a Louisiana court had personal jurisdiction over a Hong Kong corporation in a Jones Act and general maritime law action brought by the widow and personal representative of a Honduran seaman who died on the high seas while working on a Panamanian ship managed by the Hong Kong corporation. Holding that a two-part contacts/fair-play factors analysis should be applied to *general* jurisdiction cases, the court concluded that the assertion of jurisdiction over the foreign defendant did not offend due process. The Louisiana Supreme Court recognized the existence of conflicting authority on the subject:

> Some courts have resisted application of the two-part test to cases involving general jurisdiction, instead holding that plaintiff's showing of systematic and continuous contacts renders the exercise of jurisdiction fair per se. See e.g., ***Behagen v. Amateur Basketball Association of the United States of America***, 744 F.2d 731 (10th Cir. 1984), and ***Crane v. Carr***, 814 F.2d 758 (D.C. Cir. 1987). Many other courts have required that an assertion of general jurisdiction pass both prongs of the two-part test. ***Dalton v. R & W Marine,***

> ***Inc.***, 897 F.2d 1359 (5th Cir. 1990); ***Donatelli v. National Hockey League.***, 893 F.2d 459 (1st Cir. 1990); ***Bearry v. Beech Aircraft Corp.***, 818 F.2d 370 (5th Cir. 1987); ***Williams Electric Co., Inc. v. Honeywell, Inc.***, 854 F.2d 389 (11th Cir. 1988); ***Holt Oil & Gas Corp. v. Harvey***, 801 F.2d 773 (5th Cir. 1986); ***Abuan v. General Electric Co.***, 735 F.Supp. 1479 (D.Guam 1990); ***Kervin v. Red River Ski Area, Inc.***, 711 F.Supp. 1383 (E.D.Tex. 1989); ***Simmons v. SeaTide International, Inc.***, 693 F.Supp. 510 (E.D.La. 1988); ***Palmer v. Kawaguchi Iron Works, Ltd.***, 644 F. Supp. 327 (N.D.Ill. 1986).

Id. at 108.

Writing for the majority in ***Crane v. Carr,*** 814 F.2d 758 (D.C Cir. 1987), then circuit judge Ruth Bader Ginsburg remarked that:

> An enterprise incorporated and even headquartered elsewhere may operate so continuously and substantially within a state that it is fair to allow anyone to sue the enterprise in that state on any claim, without regard to where the claim arose. ***See International Shoe Co. v. Washington,*** 326 U.S. 310, 318, 66 S.Ct. 154, 159, 90 L.Ed. 95 (1945); ***Donohue v. Far Eastern Air Transp. Corp.*** 652 F.2d 1032, 1037 (D.C.Cir. 1981).

Id. at 763. The significance of this passage, which effectively restates the principle of ***Perkins*** and ***Helicopteros,***

is the ***Crane*** court's assumption that the doctrinal foundation of those two cases was not altered by ***Worldwide Volkswagen***, or other specific jurisdiction cases that apply "reasonableness" factors.

Similarly, the opinion in ***Behagen v. Amateur Basketball Association of the United States of America***, 744 F.2d 731 (10th Cir. 1984), *cert. denied*, 471 U.S. 1010, specifically relied on ***Helicopteros*** and ***Perkins*** for the proposition that due process is satisfied by a finding of continuous and systematic contacts, as exists in this case. Significantly, the court noted the absence of any connection between the forum and the cause of action:

> The Colorado courts have applied ***Perkins*** in holding that when a defendant has substantial, continuous contacts with the forum state, 'jurisdiction may be found even when the cause of action does not arise out of the forum related activity.' [Quoted citations to Colorado authorities omitted.]

Id., at 733. In so doing, the court specifically rejected the request to employ a multi-prong test, such as that used by the majority below, as being "not mandated by federal due process when the defendant's conduct in the forum is continuous and substantial." *Id.*, at 734 n.2 [citations omitted]. [9]

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[9] ***Behagan*** and ***Perkins*** also formed the basis for the opinion in ***Rogers v. Clipper Cruise Lines***, 650 F. Supp. 143 (D. Colo. 1986), in which a Colorado resident filed a diversity action against a Delaware cruise line (corporation) alleging that the defendant was violating a restrictive covenant by discharging passengers on land neighboring that of the plaintiff in the British Virgin Islands. The district found that jurisdiction was "reasonable, just and in conformance with the principles

As the tension between these cases[2/] and the opinions of the majority and the dissent below suggest, the state and federal courts need direction from this Court regarding the appropriate due process standard to apply and the relevance, if any, of the various "reasonableness" factors, in *general* jurisdiction cases. The last ten years have produced a number of complex, divergent, and cumbersome approaches, and inconsistent results appear to have become commonplace. As observed by the dissenting judge below, "[t]he sprouting like weeds of multi-pronged tests for the reasonableness inquiry in the circuits in both specific and general jurisdiction cases has left this legal garden in disarray." (App., *infra*, 34a.)[3/] By granting certiorari, this Court will be able to

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of due process" solely because "[t]through its continuous and systematic commercial activities in the Colorado travel market, the defendant ha[d] established a presence in Colorado." *Id.* at 146. Again, the court declined to engage in multi-prong analysis in a *general* jurisdiction case.

[2/]Of particular importance is that many of these cases (such as ***Reyes***) merely used the fairness" factors to lend credence to their contacts analysis. Unlike this case, the ***Reyes*** court did not dismiss the case. Similarly, in none of the several cases cited by that court for purporting to apply a two-part test did any court actually dismiss a case on the basis of "fairness" or "reasonableness" factors, having first found constitutionally sufficient contacts. Hence, although a definite conflict exists regarding whether to apply a two-part test in the first place, a more elusive yet equally compelling conflict exists in the actual application of the secondary reasonableness test in jurisdiction analysis, which until this case, has been simply an instrument of validation of contacts determinations. Even in specific jurisdiction cases, "reasonableness" factors rarely have been used for anything else. The cases in which such factors have been outcome determinative usually have involved foreign nationals, such as in ***Asahi***.

[3/] This is apparent from a mere sampling of the cases, which make the divergent applications of the reasonableness factors abundantly clear. ***See, e.g., Amoco Egypt Oil Co. v. Leonis Navigation Co.***, 1 F.3d 848, 851-53 (9th Cir.1993)(bifurcated test that employs seven-factor

provide much needed direction, and help to eliminate the confusion that resulted in the majority opinion below.

By granting certiorari, this Court can also provide guidance regarding the correct evaluation of various "reasonableness" factors, in the event such factors are deemed relevant in a *general* jurisdiction analysis. For instance, this case calls upon the Court to answer the question of whether and to what extent the fact that the plaintiff's claims may be barred in any other forum is relevant to the court's jurisdiction analysis. Regarding this, the majority below said:

> It appears that Met Life's only interest in litigating in Vermont stems from its belief that the forum may offer a more generous statute of limitations--and indeed, may be the only jurisdiction in which Met Life's suit is not barred. If we thought this consideration relevant, this factor might weigh in favor of the exercise of jurisdiction, in the sense that Vermont could be the only jurisdiction that serves the interest of the plaintiff in obtaining *effective* relief. However, such questions are not permissible considerations in the context of a jurisdictional inquiry.

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reasonableness inquiry); ***Gould v. P.T. Krakatau Steel***, 957 F.2d 573, 576 (8th Cir.) (unequally weighted five-factor balancing test), *cert. denied*, 506 U.S. 908 (1992); ***Theunissen v. Matthews***, 935 F.2d 1454, 1460-61 (6th Cir. 1991) (three-pronged balancing test in which third factor contains a five-factor sub-balancing test for reasonableness); ***Donatelli v. National Hockey League***, 893 F.2d 459, 465 (1st Cir.1990) (two-tiered test in which second tier, which considers "Gestalt" factors measuring reasonableness, is not reached absent minimum contacts); ***Bearry v. Beech Aircraft Corp.***, 818 F.2d 370 (5th Cir.1987) (bifurcated test that includes four-factor reasonableness evaluation).

(App., *infra*, 26a.) This statement flatly contradicts the Eleventh Circuit in ***Madara v. Hall***, 916 F.2d 1510 (11th Cir. 1990), in which the court remarked that "Madara [the plaintiff] has a strong interest in obtaining effective relief, particularly because the statute of limitations may have run in many other potential fora." *Id.* at 1519. Similarly, the majority's position conflicts with ***Keeton v. Hustler Magazine, Inc.***, 465 U.S. 770 (1984), discussed below, and the ***Reyes*** case, in which the court viewed the same factor to favor the plaintiff under similar circumstances, and said that "only an outright dismissal with prejudice could be more 'outcome-determinative.'" ***Reyes***, at 114. These words certainly ring true in this case. The conflict among with these cases is an important one, especially given that all litigation convenience and fairness concerns can be resolved, as discussed below, with a simple change of venue.

III. Certiorari Should Be Granted To Make Clear That If The Plaintiff's Forum Choice Satisfies The Due Process Standard For General Jurisdiction, The Proper Way To Ameliorate Convenience And Litigation Fairness Concerns Is Through The Use Of Transfer Of Venue And *Forum Non Conveniens.*

The confusion regarding the due process requirements applicable to the general-specific jurisdiction dichotomy discussed in Point I above, is compounded by the confusion among the courts concerning the relationship between the constitutional limitations on the assertion of personal jurisdiction and the statutory and common law principles of transfer of venue and *forum non conveniens*. The present case reflects that confusion and illustrates the need for this Court's review and guidance.

The majority below refused to follow ***Burger King's*** admonishment concerning the application of reasonableness

factors to defeat personal jurisdiction. ***Burger King*** downplayed the importance of these factors, stating that "[m]ost such considerations usually may be accommodated through means short of finding jurisdiction unconstitutional." ***Id.*** at 477. For example, the Court reasoned that "a defendant claiming substantial inconvenience may seek a change of venue." ***Id.*** Importantly, ***Burger King*** placed the burden on the defendant to present a *compelling case* that, in light of the various factors, the assertion of jurisdiction would be unreasonable even though the existence of sufficient minimum contacts had been shown by the plaintiff.[9/]

As its authority for not following ***Burger King,*** the majority below relied on two cases: ***Foster-Miller, Inc. v. Babcock & Wilcox Canada***, 46 F.3d 138, 150 (1st Cir. 1995) and ***Villar v. Crowley Maritime Corp.***, 990 F.2d 1489, 1501 (5th Cir. 1993). These cases are at best distinguishable from,[10/] if not plainly inconsistent with, ***Burger King*** and

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[9/]The majority's failure to follow ***Burger King*** and to consider a transfer of venue is significant, because it resulted in the dismissal of MetLife's case on constitutional grounds on the basis of a false premise - specifically, that if allowed to proceed, this lawsuit will be tried in Vermont. In reality, this lawsuit is not likely to be tried in Vermont, in part because MetLife previously offered to stipulate to a change of venue. It was inappropriate, therefore, for the majority to have based its dismissal of the lawsuit on the basis of hypothesized considerations such as Robertson-Ceco's burden in litigating in Vermont, Vermont's supposed lack of interest in the litigation, and MetLife's interest in litigating in Vermont.

[10/]Ironically, both ***Villar*** and ***Foster-Miller*** involved foreign defendants, a fact precluding a transfer of venue as a means of resolving the "reasonableness" concerns. The same problem was seen in ***Asahi,*** in which the court was left with few, if any, options short of finding specific jurisdiction unconstitutional, which would have accommodated ***Asahi's*** concerns. Unlike Robertson-Ceco, who does business in all fifty

other court of appeals cases. Thus, review is needed to resolve the confusion that has developed as to what limitations are imposed on the assertion of personal jurisdiction by due process. It is also important for this Court discuss what restrictions, if any, may be imposed on a plaintiff's selection of a forum by venue, transfer of venue, *forum non conveniens,* and other factors. This case is a perfect illustration of the fact that the absence of Supreme Court guidance has produced an inconsistency in the application of jurisdiction and venue principles, and confusion as to the appropriate standards for each. This is the kind of inconsistency that only this Court can resolve.

In addition to conflicting with ***Burger King***, the majority opinion below and ***Foster-Miller*** and ***Villar*** conflict with several other cases. These include two cases that relied on ***Burger King*** and recognized transfer of venue as a way of ameliorating "reasonableness" concerns: ***Mesalic v. Fiberfloat Corp.***, 897 F.2d 696, 701 (3rd Cir. 1990) and ***Corporate Inv. Business Brokers v. Melcher,*** 824 F.2d 786, 790-91 (9th Cir. 1987). In ***Mesalic***, which involved a Florida boat manufacturer sued in New Jersey, the Third Circuit recognized Section 1404(a) motions as the "proper means to resolve the competing forum preferences." ***Mesalic***, at 701.[11/] Similarly, in ***Melcher,*** involving an

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states and in several other countries, ***Asahi*** was an alien defendant facing a foreign nation's judicial system on a claim asserted by another alien defendant. These interests, as well as the federal interests in the government's foreign relations policies, could not be satisfied, as in this case, with a simple change of venue.

[11/]In the context of its "reasonableness" analysis, the court indicated it was significant that the dispute was "not a case where the defendant [was] required to defend itself across national borders," (***id.*** at 701), nor a "case involv[ing] one isolated occurrence where the defendant had no connection with the forum, as in ***World-Wide Volkswagen***"(***id.***, at 702).

Arizona state court lawsuit against Colorado residents, the Ninth Circuit recognized that, rather than dismissal, "the more appropriate response would be a change of venue." ***Melcher***, at 791.[12] Certiorari should be granted to resolve the conflict among these courts of appeals as well as the conflict between ***Burger King*** and the majority below.

IV. Certiorari Should Be Granted Because The Decision Below, By Focusing On Forum Shopping Concerns, Failed To Follow This Court's Decisions In *Calder* And *Keeton* And Decisions Of Other Courts Of Appeals, And Demonstrates The Necessity Of Further Definition By This Court Of The Scope Of The Due Process Limitations On Personal Jurisdiction.

The majority opinion below seems plainly inconsistent with decisions of this Court making clear that various substantive and procedural policies, regardless of their importance, are not part of the due process analysis relevant to jurisdiction concerns. Thus, this Court has said that First Amendment factors must not enter into the due process analysis for determining the proper exercise of jurisdiction. ***Calder v. Jones***, 465 U.S. 783 (1984). Likewise, this Court has said that any perceived "unfairness" in a plaintiff bringing its lawsuit in a forum purely to avail itself of a long statute of limitations "has nothing to do with the jurisdiction of the court to adjudicate claims." ***Keeton v. Hustler Magazine, Inc.***, 465 U.S. 777, 790 (1984) ("[W]e do not think such choice of law concerns should complicate or

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These same observations are relevant to this case.

[12]The Court noted that the "problems confronting [the defendant were] identical to those that face most parties who defend actions outside their home states." *Id.*

distort the jurisdictional inquiry . . . [P]laintiff's residence in the forum State is not a separate requirement [for jurisdiction], and lack of residence will not defeat jurisdiction established on the basis of defendant's contacts.") The decision below that forum shopping concerns are germane to the due process analysis required to determine the limits of *general* jurisdiction is contrary to the authority of ***Keeton and Calder.*** Thus, review, correction, and elaboration plainly are needed.

The uncertainty on this point is critical in a case like this one in which the trial and at least some of the judges of the court below expressed an antipathy for "forum shopping." The majority's handling of this matter confused venue issues and a desire to discourage forum shopping with the proper definition of the Constitution's limitations on a court's assertion of personal jurisdiction. With regard to venue and forum shopping issues, the holding below is in conflict with ***Ferens v. John Deere,*** 494 U.S. 516 (1990), which explicitly recognized that,

> An opportunity for forum shopping exists whenever a party has a choice of forums that will apply different laws . . . [and] a plaintiff already has the option of shopping for a forum with the most favorable law.

Under ***Ferens,*** a desire to avoid forum shopping should not be permitted to distort the constitutional limitations on federal or state courts' jurisdictional power over a defendant who otherwise falls within that court's legitimate exercise of jurisdictional power. Granting certiorari will give this Court the opportunity to clarify whether such substantive or procedural policies should factor into *general* jurisdiction determinations.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 663——August Term, 1995
(Argued: December 20, 1995 Decided: May 22, 1996)
Docket No. 95-7370

METROPOLITAN LIFE INSURANCE COMPANY,
Plaintiff-Appellant,

—— v.——

ROBERTSON-CECO CORP.,

Defendant-Appellant,

UNITED DOMINION INDUSTRIES, INC.,
Defendant.

Before:

WINTER, WALKER, CABRANES,
Circuit Judges.

Appeal from orders of the United States District Court for the District of Vermont (Franklin S. Billings, Jr., *Judge*), limiting plaintiff-appellant's discovery of evidence of defendant-appellee's business contacts with the state of Vermont and granting defendant-appellee's motion to dismiss for lack of personal jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(2). On appeal, plaintiff-appellant contends that the district court erred in (1) limiting discovery to a six-year period preceding the commencement of the action, and (2) dismissing the suit because (a) plaintiff-appellant satisfied its burden of demonstrating the defendant-appellee's continuous and systematic business contacts with the state of Vermont, and (b) the court's exercise of jurisdiction was otherwise reasonable under the five-factor test set forth in *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102,113 (1987).

Affirmed.

Judge Walker dissents in a separate opinion.

PATRICK E. GAAS, Houston, Texas (J. Mark Brewer, Brewer & Pritchard, P.C., Houston, Texas, David W. M. Conard, Samuel H. Press, Portnow, Little & Cicchetti, P.C., Burlington, Vermont, on the brief), *for plaintiff-appellant*.

MICHAEL B. CLAPP, Burlington, Vermont (Gary T. Carr, Bryan Cave, St. Louis, Missouri, Philip C. Woodward, Shapleigh Smith, Jr., Dinse, Erdmann & Clapp, Burlington, Vermont, on the brief), *for defendant-appellee*.

JOSÉ A. CABRANES, *Circuit Judge*:

We address here, among other things, the limits of a district court's "general" jurisdiction over an out-of-state defendant where federal subject matter jurisdiction is premised solely on diversity of citizenship. In this instance, the plaintiff-appellant Metropolitan Life Insurance Company ("Met Life") filed suit in Vermont against defendant-appellee Robertson-Ceco Corporation ("Robertson")——based on alleged acts and omissions unconnected to the state of Vermont——in an apparent attempt to benefit from Vermont's arguably more generous statute of limitations. Met Life appeals from an Amended Opinion and Order of the United States District Court for the District of Vermont (Franklin S. Billings, Jr., *Judge*), filed August 5, 1994, granting Robertson's motion to dismiss for lack of personal jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(2).

I. BACKGROUND AND JURISDICTIONAL FACTS

On August 31, 1993, Met Life filed a complaint against Robertson and United Dominion Industries, Ltd. ("United Dominion")[1] in the United States District Court for the District of Vermont alleging, *inter alia*, state breach of contract and negligence claims. Robertson is a Delaware corporation with its principal place of business in Pennsylvania and is the successor to the 1989 merger of the

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[1] United Dominion is incorporated in Ontario, Canada, with its principal place of business in North Carolina. In its complaint, Met Life alleged that United Dominion acquired all operations, assets, and liabilities of the Robertson division responsible for the acts alleged in the complaint. Summary judgment was granted in favor of United Dominion on March 14, 1995. It is not a party to this appeal.

H.H. Robertson Company and the Ceco Corporation. Met Life is a New York corporation with its principal place of business in New York.

This litigation involves the design, manufacture, and installation of a "curtain wall system"——the glass and steel or aluminum exterior walls commonly found on modern office buildings——by Robertson's Cupples Products Division, an unincorporated division located in St. Louis, Missouri.[2] According to Met Life, Robertson made various misrepresentations and supplied faulty curtain walls for the construction of the Flagship Banking Building in Miami, Florida, now owned by Met Life.[3] In its complaint, Met life alleges that the stainless steel "face sheets" of the building's curtain wall system were "delaminating and deteriorating aesthetically and in structural integrity"——that is, buckling and falling off the building——causing damage to the building and surrounding property.

On February 15, 1994, Robertson moved to dismiss the suit for lack of personal jurisdiction, defects in service of process, and failure to state a claim upon which relief can be granted. Regarding the question of personal jurisdiction, Robertson argued that there was no allegation that Met Life's claims arose out of any business conducted by Robertson in Vermont, or that Robertson had a substantial and continuous presence in Vermont justifying the exercise of personal jurisdiction. Met Life responded by filing a notice of intent to depose a corporate representative of Robertson on forty-nine topics relating to Robertson's business activities in Vermont. The notice directed Robertson to produce all

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[2] Robertson claims to have sold its Cupples Division in 1994.

[3] The building, completed in 1981, was originally owned by a Texas developer. Met Life purchased it in 1984.

relevant documents without any date restrictions or limitations. On March 30, 1994, Robertson filed a motion for a protective order under Rule 26(c),[4] arguing that the scope of Met Life's proposed areas of inquiry was overly broad, burdensome, and not limited to the relevant time period. Robertson requested that discovery be limited to matters concerning Robertson's business contacts with Vermont in 1993, the year the suit was filed. On April 20, 1994, the district court found Met Life's discovery request overbroad and issued a protective order requiring Met Life to limit the scope of its deposition to the years 1987 through 1993.

The parties filed memoranda on the personal jurisdiction question. According to Robertson, the acts and omissions alleged in Met Life's complaint occurred in St. Louis, Missouri; Houston, Texas; Dallas, Texas; and the building site in Miami, Florida. It is undisputed that none of the activities that served as the basis for Robertson's complaint took place in the state of Vermont. Although the record is incomplete, it appears that Met Life filed suit in Vermont based on its belief that Vermont has a more favorable statute of limitations period than other available

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[4] Fed.R. Civ. P.26(c) provides in relevant part:

> Upon motion by a party or by the person from whom discovery is sought, accompanied by a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action, and for good cause shown, the court in which the action is pending . . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense....

jurisdictions.[5] Thus, Met Life argues that the district court in Vermont has personal jurisdiction over Robertson on a theory of "general jurisdiction"——that is, Robertson's general business contacts with Vermont were sufficiently "continuous and systematic" to justify subjecting it to suit within the jurisdiction. *See Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414-16 & n.9 (1984) ("*Helicopteros*").

Based on its extensive discovery of Robertson's sales and employment records, Met Life claimed in its memorandum to the district court that Robertson had significant general business contacts with Vermont between 1987 and 1993, including: (1) nearly $4 million dollars in sales of its wall panel systems and other products between 1987 and 1993 and $226,319 in sales in 1993 alone to shipment addresses in Vermont; [6] (2) Robertson's relationship with five Vermont dealers of its "Star Building Systems" line of products and its contracts with four Vermont building companies that were "authorized builders" for its "Ceco Building Systems" line of products; (3) the "support" offered by Robertson to Vermont dealers and builders in the form of engineering and product data manuals, "800" phone service, training video tapes,

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[5] Robertson argues that Met Life filed suit in Vermont because it believes that it can maintain its action under Vermont's six-year statute of limitations for general civil actions. VT. STAT. ANN. tit. 12, § 511. According to Robertson, however, even if the Vermont statute of limitations applies under the relevant choice-of-law rules, the appropriate statute is VT. STAT. ANN. tit. 9A, § 2-725——the Uniform Commercial Code statute of limitations in contracts for sale——which bars claims filed four years after the accrual of the action.

[6] Sales figures for years prior to 1990 reflect the combined sales of Ceco Corp. and H.H. Robertson Corp., which merged in 1989 to form Robertson-Ceco.

computer software, marketing materials, and the right to use company-owned trademarks; (4) national advertising in various catalogs and direct mail campaigns reaching Vermont, as well as direct marketing of Robertson products to at least three Vermont architectural firms; (5) the fact that Robertson is registered to do business in Vermont, has a Vermont sales identification number, and has filed Vermont income and sales tax returns; (6) visits to Vermont by at least eight of Robertson's sales employees and engineers on over 150 occasions between 1987 and 1993; and (7) the fact that a Robertson employee resided and maintained an office in Vermont between 1989 and 1990.

Robertson, on the other hand, argued that 1993——the year that Met Life filed its suit——was the only year relevant to the determination of personal jurisdiction. According to an affidavit submitted by Robertson's vice president and controller, John Sills, Vermont sales of Robertson's Star and Ceco product lines were less than .07% of Robertson's total sales in that year. Furthermore, it argued that the sale of Robertson products to Vermont businesses through independent contractors and dealers, occasional visits to Vermont by Robertson employees, and the fact that Robertson's national advertising campaigns may have reached Vermont, were not sufficient to establish general personal jurisdiction.

On July 29, 1994, the district court adopted Robertson's argument and granted its motion to dismiss based on the absence of personal jurisdiction. Met Life moved for reconsideration because the district court had erroneously stated that Met Life had not filed a memorandum in opposition to Robertson's motion. The district court subsequently issued an Amended Opinion and Order on August 5, 1994. It held that 1993 was the relevant year for analyzing Robertson's contacts with Vermont. Noting what

it deemed to be Robertson's limited Vermont sales and the fact that Robertson "maintained no office or agents in Vermont, owned no property in Vermont, and exercised no control over its independent dealers," the district court held that "[s]uch *de minimis* business contacts do not rise to the continuous and systematic level sufficient to justify assertion of general personal jurisdiction in this suit." Furthermore, applying the two-tiered test for personal jurisdiction set forth in *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102, 113-16 (1987), it held that even if Met Life had shown that Robertson had continuous and systematic contacts with Vermont, jurisdiction would still be precluded on the ground that its exercise would be "neither fair nor reasonable" under governing case law: [Vermont] [h]aving no interest in either the litigation or the parties, this Court concludes that the exercise of general jurisdiction over Robertson-Ceco would be improper." The court denied Met Life's motion for reconsideration of the amended order on September 16, 1994.

Met Life filed its notice of appeal on April 12, 1995, challenging the court's April 20, 1994, order limiting the scope of discovery on the personal jurisdiction question to the years 1987-93 and its August 5, 1994, amended order granting Robertson's motion to dismiss.[7]

II. DISCUSSION

A. *The Legal Standards*

On a Rule 12(b)(2) motion to dismiss for lack of

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[7] Robertson moved for entry of final judgment on October 14, 1994, but because United Dominion remained a party to the case at that time, the court denied its motion. Summary judgment was later granted in favor of United Dominion on March 14, 1995.

personal jurisdiction, the plaintiff bears the burden of showing that the court has jurisdiction over the defendant. *Robinson v. Overseas Military Sales Corp.*, 21 F.2d 502, 507 (2d Cir. 1994). Prior to discovery, a plaintiff may defeat a motion to dismiss based on legally sufficient allegations of jurisdiction. *Ball v. Metallurgie Hoboken-Overpelt, S.A.*, 902 F.2d 194, 197 (2d Cir.), *cert. denied*, 498 U.S. 854 (1990). In contrast, when an evidentiary hearing is held, the plaintiff must demonstrate the court's personal jurisdiction over the defendant by a preponderance of the evidence. *Robinson*, 21 F.3d at 507 n.3. In the instant case——where the parties have conducted extensive discovery regarding the defendant's contacts with the forum state, but no evidentiary hearing has been held——"the plaintiff's *prima facie* showing, necessary to defeat a jurisdiction testing motion, must include an averment of facts that, if credited by [the ultimate trier of fact], would suffice to establish jurisdiction over the defendant." *Ball*, 902 F.2d at 197. Accordingly, for the purposes of our *de novo* review of the district court's dismissal of Met Life's suit for want of personal jurisdiction, we credit Met Life's averments of jurisdictional facts as true. *Id.*

B. *Personal Jurisdiction*

"[T]he amenability of a foreign corporation to suit in a federal court in a diversity action is determined in accordance with the law of the state where the court sits, with 'federal law' entering the picture only for the purpose of deciding whether a state's assertion of jurisdiction contravenes a constitutional guarantee." *Arrowsmith v. United Press Int'l*, 320 F.2d 219, 223 (2d Cir. 1963) (in banc); *see Savin v. Ranier*, 898 F.2d 304, 306 (2d Cir. 1990). Thus, in resolving questions of personal jurisdiction in a diversity action, a district court must conduct a two-part inquiry. First, it must determine whether the plaintiff has

shown that the defendant is amenable to service of process under the forum state's laws; and second, it must assess whether the court's assertion of jurisdiction under these laws comports with the requirements of due process. *Savin*, 898 F.2d at 306.

Courts have interpreted the relevant Vermont long-arm statute, VT. STAT. ANN. tit. 12, § 913(b),[8] as reflected a "clear policy to assert jurisdiction over individual defendants to the full extent permitted by the Due Process Clause." *Bechard v. Constanzo*, 810 F. Supp. 579, 582-83 (D. Vt. 1992) (quoting *Northern Aircraft, Inc. v. Reed*, 154 Vt. 36, 40, (1990)). Thus, for current purposes, the first part of our inquiry——the interpretation of the Vermont law governing service of process——merges with the second part of the jurisdictional test: whether the court's exercise of personal jurisdiction over the defendant satisfies the requirements of due process.

The due process requirement for personal jurisdiction, enunciated by the Supreme Court in the seminal case of *International Shoe Company v. Washington*, 326 U.S. 310 (1945), protects a person without meaningful ties to the

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[8] VT.STAT.ANN. tit. 12, § 913(b), the appropriate "long-arm" statute, provides:

> Upon the service, and if it appears that the contact with the state by the party or the activity in the state by the party or the contact or activity imputable to him is sufficient to support a personal judgment against him, the same proceedings may be had for a personal judgment against him as if the process or pleading had been served on him in the state.

See also Bechard v. Constanzo, 810 F. Supp. 579, 582 & n.2 (D. Vt. 1992).

forum state from being subjected to binding judgments within its jurisdiction. By requiring "fair warning" that an individual's activities in a state may subject him to suit there, the Due Process Clause protects that person's liberty interest and "gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471-72 (1985) (quotation marks omitted).

The due process test for personal jurisdiction has two related components" the "minimum contacts" inquiry and the "reasonableness" inquiry. The court must first determine whether the defendant has sufficient contacts with the forum state to justify the court's exercise of personal jurisdiction. *See International Shoe*, 326 U.S. at 316. For purposes of this initial inquiry, a distinction is made between "specific" jurisdiction and "general" jurisdiction. Specific jurisdiction exists when "a State exercises personal jurisdiction over a defendant in a suit arising out of or related to the defendant's contacts with the forum"; a court's general jurisdiction, on the other hand, is based on the defendant's general business contact with the forum state and permits a court to exercise its power in a case where the subject matter of the suit is unrelated to those contacts. *Helicopteros*, 466 U.S. at 414-16 & nn. 8-9. Because general jurisdiction is not related to the events giving rise to the suit, courts impose a more stringent minimum contacts test, requiring the plaintiff to demonstrate the defendant's "continuous and systematic general business contacts." *Helicopteros*, 466 U.S. at 416; *see e.g.*, *Grand Entertainment Group, Ltd. v. Star Media Sales, Inc.*, 988 F.2d 476, 481 n.3 (3d Cir. 1993); *Shute v. Carnival Cruise Lines*, 897 F.2d 377, 380-81 (9th Cir. 1990), *rev'd on other grounds*, 499 U.S. 585 (1991); *Donatelli v. National Hockey League*, 893 F.2d 459, 462-63

(1st Cir. 1990)' *Bearry v. Beech Aircraft Corp.*, 818 F.2d 370, 374 (5th Cir. 1987).

The second stage of the due process inquiry asks whether the assertion of personal jurisdiction comports with "traditional notions of fair play and substantial justice"——that is, whether it is reasonable under the circumstances of the particular case. *See International Shoe*, 326 U.S. at 316. The Supreme Court has held that the court must evaluate the following factors as part of this "reasonableness" analysis: (1) the burden that the exercise of jurisdiction will impose on the defendant; (2) the interests of the forum state in adjudicating the case; (3) the plaintiff's interest in obtaining convenient and effective relief; (4) the interstate judicial system's interest in obtaining the most efficient resolution of the controversy; and (5) the shared interest of the states in furthering substantive social policies. *Asahi*, 480 U.S. at 113-14; *see also Burger King*, 471 U.S. at 476-77; *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980); *A. I. Trade Fin., Inc. v. Petra Bank*, 989 F.2d 76, 83 (2d Cir. 1993) (discussing factors). While the exercise of jurisdiction is favored where the plaintiff has made a threshold showing of minimum contacts at the first stage of the inquiry, it may be defeated where the defendant presents "a compelling case that the presence of some other considerations would render jurisdiction unreasonable." *Burger King*, 471 U.S. at 477.

The two components of the due process inquiry are related inasmuch as both originated in the idea that a court cannot subject a person to its authority where the maintenance of the suit would offend "traditional notions of fair play and substantial justice." *See International Shoe*, 326 U.S. at 316 (discussing "fair play and substantial justice" in justifying minimum contacts stage of due process inquiry); *Burger King*, 471 U.S. at 476-77 (citing same passage to

support "reasonableness" stage). Thus, in assessing whether it may exercise jurisdiction over a particular defendant, a court must weigh the relative strengths and weaknesses of each requirement ——that is, depending upon the strength of the defendant's contacts with the forum state, the reasonableness component of the constitutional test may have a greater or lesser effect on the outcome of the due process inquiry. *See Burger King*, 471 U.S. at 477 (The application of the five-factor "reasonableness" test "may sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required."). The First Circuit has articulated the interplay of these two components of the due process inquire as follows:

> A reviewing court must first examine the defendant's contacts with the forum. If the same do not exist in sufficient abundance, that is, if the constitutionally necessary first-tier minimum is lacking, the inquiry ends. If, however, the minimum exists, the criteria catalogued by the Court must be assessed in order to determine the constitutionality, in the particular circumstances, of an exercise of jurisdiction. At that stage, the criteria may work either to shrink the minimum contacts threshold (thus facilitating the assertion of general jurisdiction) or to defeat general jurisdiction entirely.

Donatelli, 893 F.2d at 465 (citations omitted); *see also Ticketmaster-New York, Inc. v. Alioto*, 26 F.3d 201, 210 (1st Cir. 1994) ("We think . . . that the reasonableness prong of the due process inquiry evokes a sliding scale: the weaker the plaintiff's showing [on minimum contacts], the less a defendant need show in terms of unreasonableness to defeat jurisdiction. The reverse is equally true: an especially strong showing of reasonableness may serve to fortify a borderline showing of [minimum contacts]."); *Ellicott Mach. Corp. v.*

John Holland Party, Ltd.,995 F.2d 474, 479 (4th Cir. 1993) (finding that insubstantial nature of defendant's minimum contacts with forum state required "a more concerned focus on the second prong of the due process analysis").

With this in mind, we proceed to the two stages of the due process inquiry.

I. Minimum Contacts

a. Period for Assessing Minimum Contacts

As a preliminary matter, the parties dispute the applicable time period for assessing a defendant's minimum contacts with the forum state. Met Life argues that the phrase "continuous and systematic" suggests an examination of the defendant's contacts over a period of several years before the filing of the lawsuit. Robertson, on the other hand, argues that minimum contacts should be assessed based on the defendant's contacts with the forum state *only* for the year in which the complaint was filed. Notwithstanding its earlier order permitting discovery on the question of Robertson's contacts between 1987 and 1993, the district court held that "Robertson-Ceco's contacts with Vermont must be analyzed during 1993, the year plaintiff filed the action.

Few cases discuss explicitly the appropriate time period for assessing whether a defendant's contacts with the forum state are sufficiently "continuous and systematic" for the purposes of general jurisdiction. However, our review of general jurisdiction cases reveals that contacts are commonly assessed over a period of years prior to the plaintiff's filing of the complaint. For example, in *Helicopteros*, 466 U.S. at 409-11, the Supreme Court examined the defendant's contacts with the forum state over

a seven-year period to determine whether it met the "continuous and systematic" minimum contacts test. Likewise, other circuits have examined minimum contacts over a reasonable period of years in general jurisdiction cases, *see Wilson v. Belin*, 20 F.3d 644, 650-51 (5th Cir.) (examining defendant's contacts with forum state over five-year period in assessing minimum contacts for general jurisdiction purposes), *cert. denied*, 115 S. Ct. 322 (1994); *Bearry*, 818 F.2d at 372, 376 (analyzing defendant's contacts with forum state over five-year period in general jurisdiction case); *Gates Learjet Corp. v. Jensen*, 743 F.2d 1325, 1329, 1330-31 (9th Cir. 1984) (examining defendant's contacts over three-year period in connection with general jurisdiction inquiry). Finally, our own circuit has suggested in *dictum* that examining a defendant's contacts over a period of several years is appropriate when applying the "continuous and systematic" standard, *Braman v. Mary Hitchcock Memorial Hosp.*, 631 F.2d 6,9 (2d Cir. 1980) (implying that defendant's contacts with the forum state over five-year period relevant to minimum contacts inquiry).

Because the phase "continuous and systematic" necessarily requires that courts evaluate the defendant's contact with the forum state over time, we find that, while the district court reasonably provided for discovery for a six-year period (1987-93), it later erred in mechanically limiting its jurisdictional inquiry to the year 1993. The minimum contacts inquiry is fact-intensive, and the appropriate period for evaluating a defendant's contacts will vary in individual cases. In general jurisdiction cases, district courts should examine a defendant's contacts with the forum state over a period that is reasonable under the circumstances——up to and including the date the suit was filed——to assess whether

they satisfy the "continuous and systematic" standard.[9] The determination of what period is reasonable in the context of each case should be left to the court's discretion.

Inasmuch as the district court improperly limited its minimum contacts inquiry to the year 1993, we examine *de novo* Robertson's contacts with the state of Vermont between the years 1987 through 1993——the period the district court properly found to be reasonable for discovery purposes.

b. Assessing Minimum Contacts

The assessment of minimum contacts is fact-specific and must necessarily be tailored to the circumstances of each case. Met Life identifies roughly five categories of general business contacts between Robertson and Vermont during the

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[9] This rule is not inconsistent with *Klinghoffer v. S.N.C. Achille Lauro*, 937 F.2d 44, 52 (2d Cir. 1991), where we held that the court must consider a defendant's contacts with the forum state "at the time the lawsuit was filed" when deciding a motion to dismiss for lack of personal jurisdiction. In *Klinghoffer* the district court's exercise of jurisdiction over the Palestine Liberation Organization ("PLO") was premised upon evidence of certain fundraising and "proselytizing" activities antedating the 1987 passage of the Anti-Terrorism Act, 22 U.S.C. §§ 5201-5203 (1988) (the "ATA"), which made most PLO activity in the United States unlawful. Because two of the complaints against the PLO were filed in 1988, we remanded for additional factfinding on whether the activities continued despite the ATA's passage and would therefore support personal jurisdiction over the PLO as to those complaints. In holding that a court must consider the defendant's contacts with the forum state at the time the lawsuit was filed, we neither stated nor implied that the jurisdictional inquiry was *limited* to the year the suit was filed. The other cases cited by Robertson are also distinguishable because they are specific jurisdiction cases where the "continuous and systematic" standard is simply not applicable. *See Lachman v. Bank of Louisiana in New Orleans*, 510 F.Supp. 753, 757-58 (N.D. Ohio 1981); *see also Connecticut Artcraft Corp. v. Smith*, 574 F. Supp. 626, 630 (D.Conn. 1983) (relying on *Lachman*).

period 1987-93 that it contends were sufficiently continuous and systematic to permit a Vermont court to exercise jurisdiction: (1) Sales: nearly $4 million dollars in sales of its wall panel systems and other products between 1989 and 1993 to Vermont addresses and Robertson's filing of Vermont income and sales tax returns during the relevant period; (2) Dealers: Robertson's relationship with five "independent" Vermont dealers of its "Star" line of products and its contracts with four Vermont building companies that were "authorized builders" for its "Ceco" line of products; (3) Product support: engineering and product data manuals, "800" phone service, training video tapes, computer software, marketing materials, and the right to use company-owned trademarks; (4) Advertising and marketing: national advertising in catalogs and direct mail campaigns that reach Vermont and direct marketing to at least three vermont architectural firms; and (5) Presence of Robertson employees in Vermont: visits by Robertson's employees and engineers to Vermont on more than 150 occasions between 1987 and 1993, and the fact that a Robertson employee resided and maintained an office in Vermont in 1989-90.

Met Life argues that the district erred in finding that it failed to demonstrate Robertson's "continuous and systematic" contacts with the state of Vermont. It contends that although certain categories of contacts alleged by Met Life might be insufficient to establish minimum contacts when taken individually, *see*, *e.g.*, *Sandstrom v. ChemLawn Corp.*, 904 F.2d 83,89 (1st Cir. 1990) (mere license to do business and designation of agent for service of process within the forum state insufficient to confer general jurisdiction; "help-wanted" advertising——absent any product or service-related advertising——similarly insufficient); *Gates Learjet Corp. v. Jensen*, 743 F.2d at 1331 (mere solicitation of business through visits, telephone calls, and telexes to the forum state does not support general

jurisdiction) *cert. denied*, 471 U.S. 1066 (1985), Robertson's business activities in Vermont, *when taken together*, are sufficient to establish general jurisdiction. We agree with Met Life that Robertson's various contacts with the forum state should not be examined separately or in isolation. There is no talismanic significance to any one contact or set of contacts that a defendant may have with a forum state; courts should assess the defendant's contacts *as a whole*. We agree with the Fifth Circuit that

> [d]etermining the existence of personal jurisdiction does not . . . involve an examination of each of [the defendant's] contacts with [the forum state] viewed in isolation from one another. Rather we are required to examine [the defendant's] contacts *in toto* to determine whether they constitute the kind of continuous and systematic contacts required to satisfy due process.

Holt Oil & Gas Corp. v. Harvey, 801 F.2d 773, 779 (5th Cir. 1986), *cert. denied*, 481 U.S. 1015 (1987). This approach is more consistent with our view of the minimum contacts analysis as a contextual inquiry.

The two leading Supreme Court cases addressing what constitute "continuous and systematic" business operations provide a useful starting point for our analysis. In *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437, 445-46 (1952), the Supreme Court first articulated the idea that a court may exercise personal jurisdiction over a foreign corporation based on general business operations within the forum state. The defendant (a Philippine mining corporation) was found to have met the standard where the general manager and president of the company moved his office to Ohio (during the Japanese occupation of the Philippines during World War II), maintained records, held directors'

meetings, and generally "carried on in Ohio a continuous and systematic supervision of the necessarily limited wartime activities of the company." *Id.* at 448. In contrast, in *Helicopteros*, 466 U.S. at 411-12, 416, the Court found that the defendant Colombian corporation's general business contacts with Texas did not meet the minimum contacts standard where the defendant had purchased equipment from a company in the forum state, sent personnel to the forum state for training, and sent an officer of the corporation on a single trip to the forum for contract negotiations, but had never performed operations or solicited business within the state or sold any product that reached the forum state. The Court held that "mere purchases"——even at regular intervals ——and the related brief presence of employees, did not rise to the level of "continuous and systematic general business contacts" contemplated by the *Perkins* court. *Helicopteros*, 466 U.S. at 416-18.

Many cases, including this one, fall between *Perkins* and *Helicopteros*. On the one hand, unlike the defendant in *Perkins*. Robertson certainly did not use Vermont as a central office location for supervisory activities. On the other hand, unlike the defendant in *Helicopteros*, Robertson solicited business in Vermont and sold its products through Vermont dealers to Vermont customers. In support of its argument that the district court properly found that it lacked continuous and systematic contacts with Vermont, Robertson relies on three different cases——none of them binding on us or particularly persuasive. In the first of these, *Bearry v. Beech Aircraft Corp.*, 818 F.2d 370 (5th Cir. 1987), the Fifth Circuit reversed a district court's finding of general jurisdiction in a suit brought in Texas against an airplane manufacturer for a crash occurring in Mississippi, despite the fact that the defendant had $250 million sales in Texas over a five-year period through seventeen different independent dealers. Robertson likens its contacts to those of the

defendant in *Bearry*, drawing on the court's statement that "[the fact] that Beech products flow into Texas does not create a general presence in that state . . . . [D]istributors selling Beech manufactured products for their own account do not create minimum contacts sufficient to warrant general jurisdiction over Beech." *Id.* at 376. We find *Bearry* distinguishable, however, because the court's holding turned on the fact that all sales were carefully structured so that the negotiation, completion, and performance of all contracts occurred in Kansas, rather than Texas. Inasmuch as "[e]ach transaction was completed outside of Texas," *id.*, the Court of Appeals concluded that the mere flow of Beech products into the state did not constitute sufficiently substantial business contacts to satisfy the minimum contacts test. *See also Dalton v. R. & W. Marine, Inc.*, 897 F.2d 1359, 1362 (5th Cir. 1990) ("A corporation's obvious intent to exercise its due process rights" by deliberately executing its contracts outside of the forum state "should not be disregarded lightly.") (internal quotation marks omitted). Here, there is no suggestion that Robertson's Vermont sales were executed outside the state or that they were deliberately structured to avoid general jurisdiction in Vermont.

The other two cases on which Robertson relies are arguably closer to this case. In *Glater v. Eli Lilly & Co.*, 744 F.2d 213, 215, 217 (1st Cir. 1984), the First Circuit found a defendant corporation's general business contacts too fragmentary to satisfy the constitutional standard for general jurisdiction where it advertised its pharmaceutical product in trade journals reaching the forum state and employed eight sales representatives to service physicians, pharmacies, and hospitals within the state. Similarly, in *Shute v. Carnival Cruise Lines*, 897 F.2d at 381, the Ninth Circuit found that the defendant cruise line, whose contacts with the forum state of Washington were limited to advertising in the local media, payment of commissions to travel agents, and sales of cruises

to residents of the state, was not subject to the jurisdiction of Washington's courts. *See also Congoleum Corp. v. DLW Aktiengesellschaft*, 729 F.2d 1240, 1242 (9th Cir. 1984) ("[N]o court has ever held that the maintenance of even a substantial sales force within the state is a sufficient contact to assert jurisdiction in an unrelated cause of action.").

On the other hand, at least one other court of appeals——as well as a district court within our own circuit——has found contacts similar to those found here sufficient to satisfy the minimum contacts test. In *Provident National Bank v. California Federal Savings & Loan*, 819 F.2d 434, 436 (3d Cir. 1987), the Third Circuit found continuous and systematic contacts between California Federal ("Cal Fed") and the state of Pennsylvania, where Cal Fed "maintained no Pennsylvania office, employees, agents, mailing address, or telephone number" and "had not applied to do business in Pennsylvania, did no advertising in Pennsylvania, and paid no taxes there." Indeed, the entire basis for the exercise of personal jurisdiction in that case was the fact that (1) a minuscule percentage of Cal Fed's depositors were Pennsylvania residents, contributing an equally small fraction of Cal Fed's total deposits; (2) three Pennsylvania financial institutions "serviced" $10.2 million dollars worth of loans (loans not made in Pennsylvania) for Cal Fed——that is, the banks collected loan payments owed to Cal Fed in exchange for a fee; and (3) Cal Fed maintained a "controlled disbursement account" with a Pennsylvania bank under which Cal Fed would wire funds every business day sufficient to cover the total amount of checks cleared through the bank that day. *Id.* Because the handling of deposits and servicing of loans——however small the proportion of activities conducted on behalf of Pennsylvania customers might have been ——were central to Cal Fed's activities and because Cal Fed's maintenance of the controlled disbursement account required Cal Fed to conduct

"substantial, ongoing, and systematic activity in Pennsylvania," *id.* at 438, the court found that the minimum contacts component of the due process inquiry was satisfied. Furthermore, in *Sollinger v. Nasco International, Inc.*, 655 F. Supp. 1385 (D. Vt. 1987), the court found that a defendant's mail order sales to Vermont residents satisfied the "continuous and systematic" standard:

> Through its catalogs, Nasco advertises and otherwise solicits business in Vermont. By mail and telephone Nasco sells its wares directly to Vermont residents. Nasco carries on in Vermont a " 'continuous and systematic, but limited, part of its general business . . . .'" *Helicopteros Nacionales*, 466 U.S. at 415, quoting *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437, 438 (1952). Although something less than the contacts described in *Helicopters Nacionales* and *Perkins* may support as assertion of general jurisdiction over a foreign corporation, we find Nasco's contacts with Vermont to be continuous and systematic.

Id. at 1389 (internal quotation marks, alterations, and citations omitted).

The various approaches described above demonstrate that this is a close case. And while it is clear that Robertson's contacts do not rise to the level of those described in *Perkins*, we cannot agree with the district court's assessment of Robertson's Vermont contacts as "*de minimis.*" While it is true that Robertson "owned no property in Vermont, and exercised no control over its independent dealers," the contacts it did have with the state were more than sporadic and occasional. While Robertson's $4 million dollars in sales in Vermont between 1987 and 1993, standing alone, may not have been sufficient, its

relationship with dealers selling its products and it so-called "authorized" builders, the visits to those dealers and builders by Robertson personnel, the advertising and support available to Vermont residents regarding Robertson's products, and the deliberate targeting of Vermont architectural firms as sales prospects, tips the balance in Met Life's favor and leads us to conclude that it satisfied the "minimum contacts" requirement of the due process test.

2. *The Reasonableness Factors*

Once a plaintiff has demonstrated the requisite minimum contacts between the defendant and the forum state, a court is required to continue to the "reasonableness" stage of the inquiry and apply the five-factor test of *Asahi* to assess whether the exercise of jurisdiction comports with "traditional notions of fair play and substantial justice." *Asahi*, 480 U.S. at 113 (quotation marks omitted); *see A. I. Trade Fin.*, 989 F.2d at 83 ("Once minimum contacts have been established, the reasonableness of the exercise of jurisdiction must be determined by an evaluation of several factors including the burden on the defendant, the interests of the forum state, and the plaintiff's interest in obtaining relief.") (internal quotation marks omitted). [10]

As our dissenting colleague points out, the Supreme Court has not had occasion to conduct the reasonableness inquiry in a general jurisdiction case——*Asahi* and *Burger King* were both specific jurisdiction cases. However, every

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[10] Although in *A.I. Trade Finance* we specifically referred to only three of the *Asahi* factors, we cited *Asahi* and indicated that those three factors were "includ[ed]" among the "several factors" that must be assessed in making the reasonableness determination. *A. I. Trade Fin.*, 989 F.2d at 83. Accordingly, our analysis below employs the full five-factor test.

circuit that has considered the question has held, implicitly or explicitly, that the reasonableness inquiry is applicable to *all* questions of personal jurisdiction, general or specific. In *Amoco Egypt Oil Co. v. Leonis Navigation Co.*, 1 F.3d 848, 851 n.1 (9th Cir. 1993), the Ninth Circuit noted that "[a]lthough neither the Supreme Court nor this circuit has explicitly engaged in a separate reasonableness inquiry in a general jurisdiction case, *Asahi's* interpretation of *International Shoe* as entailing separate contacts and reasonableness inquiries is not limited to the specific jurisdiction context." *See Donatelli*, 893 F.2d at 465 (discussing application of minimum contacts and reasonableness analyses in general jurisdiction case); *Bearry*, 818 F.2d at 377 ("Even if [the defendant's] connections . . . could be said to be continuous and systematic, we are persuaded that the exercise of general jurisdiction in this case would not be fair and reasonable."). Inasmuch as we see no basis for distinguishing between general jurisdiction and specific jurisdiction cases for the purposes of the reasonableness inquiry and there is no indication that the Court intended to limit the inquiry to specific jurisdiction cases, we agree with other courts of appeals that it is appropriate in general jurisdiction cases.

The district court found that exercising general jurisdiction over Robertson in this case would be neither fair nor reasonable under the five-factor *Asahi* test:

> Plaintiff, a non-resident suing on a cause of action that arose in Florida, has no interest in the lawsuit proceeding in Vermont. No witness or other evidence is located in Vermont, and defendant is a nonresident. . . . Florida, the locus of the alleged tort, and New York, plaintiff's domicile, have far more significant interest in resolving the dispute

> Having no interest in either the litigation or the parties, this court concludes that the exercise of general jurisdiction over Robertson-Ceco would be improper.

Our analysis leads to the same conclusion.

a. Burden on the Defendant

Certainly, there are many difficulties associated with requiring Robertson, a Delaware corporation with its principal place of business in Pennsylvania, to defend this suit in Vermont. Significantly, none of its records, files, or witnesses with information about the litigation are located there. On the other hand, the conveniences of modern communication and transportation ease what would have been a serious burden only a few decades ago. Thus, while we believe this factor cuts slightly in favor of the defendant in the instant case, we recognize that, taken alone, it falls short of overcoming the plaintiff's threshold showing of minimum contacts.

b. Interest of the Forum

We find that the dispute between Met Life and Robertson implicates absolutely no interest of the state of Vermont. The acts and omissions that serve as the basis for Met Life's suit occurred in Texas, Missouri, and Florida. Furthermore, unlike cases in which the forum state has an arguable interest in providing redress to its own citizens for injuries occurring outside of its jurisdiction, *see Caruth v. International Psychoanalytical Ass'n*, 59 F.3d 126, 129 (9th Cir. 1995); *Grand Entertainment*, 988 F.2d at 483; *Interfirst Bank Clifton v. Fernandez*, 844 F.2d 279, 285 (5th Cir.

1988), plaintiff Met Life is both incorporated in and has its principal place of business in New York. To the extent that Robertson's business contacts with Vermont might give the state a general interest in disputes concerning its products, we agree with the Fifth Circuit:

> The concerns that injuries might occur in the state or might somehow implicate [citizens of the forum state] are adequately protected. [The defendant] is subject to *the specific jurisdiction [of forum state] courts* when its product causes injuries or when it breaches a contract [in the forum state].

Bearry, 818 F.2d at 377 (emphasis added). Accordingly we believe this factor weights heavily against the reasonableness of the court's exercise of general jurisdiction over Robertson.

c. Interests of the Plaintiff in Obtaining Convenient and Effective Relief

For similar reasons, we fail to see how the plaintiff's interests in proceeding in a convenient forum would be served by subjecting the defendant to suit in Vermont. Met Life is not a Vermont citizen and it has not identified any witnesses or other evidence more convenient to that forum. It appears that Met Life's only interest in litigating in Vermont stems from its belief that the forum may offer a more generous statute of limitations——and indeed, may be the only jurisdiction in which Met Life's suit is not barred. If we thought this consideration relevant, this factor might weigh in favor of the exercise of jurisdiction, in the sense that Vermont could be the only jurisdiction that serves the interest of the plaintiff in obtaining *effective* relief. However, such questions are not permissible considerations in the context of a jurisdictional inquiry. As the Supreme Court stated in *Keeton v. Hustler Magazine, Inc.*, 465 U.S.

770, 778 (1984): "The question of the applicability of [the forum state's] statute of limitations . . . presents itself in the course of litigation only after jurisdiction over respondent is established, and we do not think that such choice of law concerns should complicate or distort the jurisdictional inquiry." There the Court declined to accept the defendant's argument that permitting the plaintiff's suit to proceed in the only forum where the statute of limitations had not yet run would be fundamentally unfair. If choice-of-law considerations cannot be invoked by the defendant to demonstrate the unreasonableness of exercising jurisdiction, they likewise should not complicate our analysis of the plaintiff's interests in proceeding in Vermont.

d. Efficient Administration of Justice

In evaluating this factor, courts generally consider where witnesses and evidence are likely to be located. *See Caruth*, 59 F.3d at 129; *Vermeulen v. Renault, U.S.A., Inc.*,985 F.2d 1534, 1552 (11th Cir.), *cert. denied*, 508 U.S. 967 (1993). As the district court well noted, "[n]o witness or other evidence is located in Vermont, and defendant is a nonresident . . . . Florida, the locus of the alleged tort, and New York, plaintiff's domicile, have far more significant interests in resolving the dispute." This factor strongly favors Robertson.

e. Policy Arguments

This factor requires us to consider the common interest of the several states in promoting substantive social policies. Met Life has not suggested, much less shown, any substantive social policies that would be furthered by permitting this case to be heard in Vermont, and we can imagine none. This factor does not favor either party in our assessment of the reasonableness criteria.

* * * * *

Reviewing the results of our "reasonableness" inquiry, we note that the first factor tips the scale slightly against the exercise of jurisdiction, while the second, third, and fourth factors weigh heavily against it. In the circumstances thus presented it seems clear to us that the district court correctly concluded that subjecting Robertson to suit in Vermont would be contrary to "traditional notions of fair play and substantial justice," and properly dismissed the suit for want of personal jurisdiction.

In affirming the judgment of the district court, we are mindful of the Supreme Court's admonition in *Burger King*, 471 U.S. at 477, that dismissals resulting from the application of the reasonableness test should be few and far between:

> [W]here a defendant who purposefully has directed his activities at forum residents [or has established minimum contacts] seeks to defeat jurisdiction, he must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable.

This case presents the kind of exceptional situation envisaged by the Court in *Burger King*: here the existence of minimum contacts between the defendant and the forum state presents an arguably close question, but the analysis of the *Asahi* factors reveals that the exercise of personal jurisdiction would be decidedly unreasonable. Such cases may be unusual, but they remain good candidates for dismissal. *See Ticketmaster*, 26 F.3d at 210; *Ellicott Mach. Corp.*, 995 F.2d at 479. It is true, of course, that in certain cases, many of the inconveniences created by subjecting a nonresident defendant to the court's jurisdiction can be cured by a change

of venue under 28 U.S.C. § 1404(a),[11] *see Burger King*, 471 U.S. at 477 & n.20; *Mescalic v. Fiberfloat Corp.*, 897 F.2d 696, 701 (3rd Cir. 1990); *Corporate Inv. Business Brokers v. Melcher*, 824 F.2d 786, 790-91 (9th Cir. 1987), but it is also the case that issues of convenience pertinent to a § 1404 motion and the related common law concept of *forum non conveniens* should not be conflated with the due process concerns that are the focus of the *Asahi* test. *Foster-Miller, Inc. v. Babcock & Wilcox Canada*, 46 F.3d 138, 150 (1st Cir. 1995); *Villar v. Crowley Maritime Corp.* 990 F.2d 1489, 1501 (5th Cir. 1993) (Johnson, J., concurring in part). *cert. denied.* 114 S.Ct. 690 (1994). The present case is not one in which subjecting Robertson to jurisdiction in Vermont would merely be inconvenient; Met Life's interest in pursuing its action in Vermont and Vermont's interest in adjudicating the case are so attenuated, if not nonexistent, that the exercise of personal jurisdiction would violate our basic sense of "fair play and substantial justice"——and deprive the defendants of the due process guaranteed by the Constitution.

C. *Scope of Discovery*

As a final issue, Met Life challenges the district court's decision to limit the scope of its discovery of Robertson's Vermont contacts to the years 1987 through 1993. The district court's protective order can be reversed only if Met Life demonstrates that the court abused its discretion. *In re American Tobacco Co.*, 880 F.2d 1520, 1530 (2d Cir. 1989).

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[11] 28 U.S.C. § 1404(a) provides:

> For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

As discussed above, *see supra* pp. 15-16, the court's order limiting discovery to a six-year period prior to the commencement of the suit was entirely appropriate; its error was in limiting its own inquiry into Robertson's contacts with the state of Vermont to the year 1993, rather than considering its contacts over the entire discovery period (1987-93). Met Life conducted substantial discovery, deposed numerous Robertson employees and had access to six years of sales and employment records. Allowing discovery of Robertson's contacts over an unlimited time period, as requested by Met Life, would have been overly broad and unquestionably burdensome for Robertson. We find no abuse of discretion.

III. CONCLUSION

To summarize:

1. Scope of Discovery

The district court did not abuse its discretion in limiting Met Life's discovery of Robertson's Vermont contacts to the years 1987-93.

2. Minimum Contacts

a. In *general* jurisdiction cases district courts should examine a defendant's general business contacts with the forum state over a period that is reasonable in the context of the case presented. We find that the district court erred in limiting its jurisdictional inquiry regarding Robertson's Vermont contacts to the year 1993.

b. We disagree with the district court's conclusion that, in the circumstances presented, Met Life failed to satisfy its burden of demonstrating that Robertson had

"continuous and systematic" general business contacts with the state of Vermont. Robertson's $4 million dollars in sales in Vermont, its relationship with dealers and "authorized builders" selling its products in Vermont, its advertising in Vermont, its deliberate targeting of Vermont architectural firms as sales prospects, and the repeated visits to Vermont by Robertson personnel, were sufficient to satisfy that standard.

3. Reasonableness

We find the five-factor "reasonableness" inquiry set forth in *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102, 113 (1987), to be applicable to general jurisdiction cases. Applying that test to the present case, we affirm the district court's conclusion that, in the absence of any cognizable interest on the part of the plaintiff or the state of Vermont in adjudicating these claims in Vermont, the exercise of jurisdiction in these circumstances would violate traditional notions of fair play and substantial justice.

Accordingly, we affirm the district court's order limiting Met Life's discovery of Robertson's contacts with Vermont to the years 1987-93 and its order dismissing Met Life's suit against Robertson for lack of personal jurisdiction.

WALKER, *Circuit Judge*, dissenting:

The majority's adoption of a bifurcated personal jurisdiction test, which extends to the general jurisdiction context the Supreme Court's holdings in the specific jurisdiction cases of *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), and *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987), and our holding in

A. I. Trade Finance, Inc. v. Petra Bank, 989 F.2d 76 (2d Cir. 1993), erodes the doctrinal foundation established in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). Shortly after the decision in *International Shoe*, the Supreme Court decided *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947), which established the doctrine of forum non conveniens whereby a court may dismiss or transfer a case because a forum is inconvenient notwithstanding that the court has in personam jurisdiction over the defendant. It is the doctrine of forum non conveniens that should govern whether this suit stays in Vermont, not the doctrine of general personal jurisdiction. Because the majority brushes aside the central tenet of jurisdictional due process established in *International Shoe* by allowing the interests of the plaintiff and of the forum to displace the liberty interests of the defendant, I respectfully dissent.

The modern constitutional due process standard for the exercise of personal jurisdiction over a non-present defendant was first pronounced in *International Shoe*. That a court must have personal jurisdiction flows from the Due Process Clause of the Fifth Amendment, which "requires only that . . . a defendant . . . have certain minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe*, 326 U.S. at 316 (citation omitted). The Supreme Court's opinion in *International Shoe*, which implicated only the interests of the defendant and not the interests of the plaintiff or of the forum state, made it clear that whether due process is satisfied turns exclusively on the fairness to the defendant in being made to defend a suit in a particular forum.

The majority's holding is, in part, an accommodation of the Supreme Court's more recent jurisprudence which reconfigures the jurisdictional underpinning of *International*

Shoe. Thirty-five years after the Supreme Court hailed "minimum contacts" as the constitutional touch stone of the due process analysis, it espoused, albeit in dicta, an additional due process consideration concerning the protection of interstate federalism. *World-Wide Volkswagen*, 444 U.S. at 292-93. This supplemental function of due process is the precursor to the majority's "reasonableness" inquiry in the present case. Only two years later, however, in *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982), the Supreme Court reaffirmed its earlier course, recognizing that the personal jurisdiction requirement "represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty," *id.* at 702 (footnote omitted), and explaining that "[t]he restriction on state sovereign power described in *World-Wide Volkswagen Corp.* . . . must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause," *id.* at 702-03 n.10. In spite of this reassertion, in *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476-77 (1985), and later in *Asahi*, 480 U.S. at 113-15, the Supreme Court doubled-back to its holding in *World-Wide Volkswagen* by defining the test for specific jurisdiction to include both a "minimum contacts" and a "reasonableness" component. In other words, the concept of "traditional notions of fair play and substantive justice," which was defined in *International Shoe* only by the "contacts" of the defendant with the forum state, has been transformed into the notion of reasonableness apart from the contacts.

In the wake of *Burger King* and *Asahi*, we are bound to adhere to the Supreme Court's adoption of a reasonableness inquiry in the specific jurisdiction context. In the general jurisdiction context, however, we are not so bound. I believe that the Supreme Court's silence (except arguably in dicta) regarding the application of a

reasonableness test in the general jurisdiction context should not be construed as evidencing the Court's desire to erode the half-century-old doctrine of *International Shoe*. The majority's holding today requires courts to consider interests beyond the defendant's interests, which are the only interests that require consideration under *International Shoe*. Unless and until the Supreme Court instructs us in a general jurisdiction case that interests other than those of the defendant are implicated by due process in the personal jurisdiction analysis, we should not rush to make them so. I believe that these ancillary interests, which have nothing to do with whether it is fair and just for a foreign defendant to be haled into an out-of-state court, are properly accounted for under the doctrine of forum non conveniens.

The fact that other circuits have chosen the course embarked on by the majority, if anything, reinforces my concerns. The sprouting like weeds of multi-pronged tests for the reasonableness inquiry in the circuits in both specific and general jurisdiction cases has left this legal garden in disarray. *See, e.g., Amoco Egypt Oil Co. v. Leonis Navigation Co.*, 1 F.3d 848, 851-53 (9th Cir. 1993) (bifurcated test that employs seven-factor reasonableness inquiry); *Gould v. P.T. Krakatau Steel*, 957 F.2d 573 (8th Cir.) (unequally weighted five-factor balancing test), *cert. denied*, 506 U.S. 908 (1992); *Theunissen v. Matthews*, 935 F.2d 1454, 1460-61 (6th Cir. 1991) (three-pronged balancing test in which third factor contains a five-factor sub-balancing test for reasonableness); *Donatelli v. National Hockey League*, 893 F.2d 459 (1st Cir. 1990) (two-tiered test in which second tier, which considers "Gestalt" factors measuring reasonableness, is not reached absent minimum contacts); *Bearry v. Beech Aircraft Corp.*, 818 F.2d 370 (5th Cir. 1987) (bifurcated test that includes four-factor reasonableness evaluation). That the reasonableness test is inherently discretionary cannot be disputed, and from today

forward, in this circuit there can be no certainty for the practitioner as to the presence or absence of personal jurisdiction over the out-of-state defendant until the matter is litigated.

Although I agree that this case is not one properly tried in Vermont, I believe that this issue is suitably resolved on a motion for dismissal or removal under forum non conveniens rather than as a matter of in personam jurisdiction. Accordingly, I respectfully dissent.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

U.S. DISTRICT COURT
DISTRICT OF VT
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METROPOLITAN LIFE INSURANCE CO.	:	
v.	:	Civil No. 5:93-259
ROBERTSON-CECO CORP. and UNITED DOMINION INDUSTRIES, LTD.	:	

ORDER

On August 19, 1994 plaintiff moved the Court to reconsider its Order dated August 5 granting summary judgment for defendant Robertson-Ceco Corp. ("Robertson-Ceco) for lack of general personal jurisdiction. No opposition has been filed, thus, pursuant to Local Rule 5(A)(3), the motion may be granted without oral argument.

In its Order of August 5, which incorporated the Court's Order of July 29, 1994, the Court determined that Robertson-Ceco had insufficient contacts with the District of Vermont to justify the Court's assertion of general personal jurisdiction in the present litigation. Plaintiff raises no additional facts or grounds which would justify reversal of the Court's prior ruling.

Consequently, the Court hereby DENIES plaintiff's Motion to Reconsider for the reasons stated in its Order dated August 5, 1994.

SO ORDERED.

Dated at Rutland in the District of Vermont this 16th day of September, 1994.

/s/ Franklin S. Billings, Jr.
Franklin S. Billings, Jr.
Senior District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

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DISTRICT OF VT
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METROPOLITAN LIFE INSURANCE CO.	:	
v.	:	Civil No. 5:93-259
ROBERTSON-CECO CORP. and UNITED DOMINION INDUSTRIES, LTD.	:	

AMENDED OPINION AND ORDER

By Order dated July 29, 1994 the Court granted summary judgment for defendant Robertson-Ceco Corp. ("Robertson-Ceco") under the false assumption that plaintiff had filed no opposition to the motion. The Court now amends its prior Order with regard to personal jurisdiction, giving full consideration to plaintiff's memorandum in opposition and Robertson-Ceco's reply brief.

Plaintiff bears the burden of proving that defendant has "certain minimum contacts with [the forum] such that maintenance of the suit does not offend 'traditional notions

of fair play and substantial justice.'"[1] *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). Under Vermont's long-arm statute, 12 V.S.A. § 913(b), a court may exercise general personal jurisdiction over out-of-state defendants "to the full extent permitted by the Due Process Clause." *Bechard v. Constanzo*, 810 F.Supp. 579, 582 (D. Vt. 1992) (citing *Northern Aircraft Inc. v. Reed*, 154 Vt. 36, 40 (1990)). The Due Process Clause, which limits the power of a state to assert personal jurisdiction over a nonresident defendant, requires that a defendant have "fair warning that a particular activity may subject it to the jurisdiction of a foreign sovereign." *Shaffer v. Heitner*, 433 U.S. 186, 218 (1977). In other words, a defendant's contacts with the forum state must be such that the defendant could reasonably anticipate being haled into court there. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (*citing World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

Where the cause of action does not arise from or relate to the foreign corporation's purposeful conduct within the forum state, due process requires that there be continuous and systematic contacts between the state and the foreign corporation to warrant a court's exercise of "general" personal jurisdiction. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984). While the nature and quality of a defendant's contacts with the forum continue to be the touchstone for determining whether assertion of personal jurisdiction is proper, such assertion must also be fair and reasonable. *Asahi Metal Ind. v. Superior Court*, 480 U.S. 102, 113-16 (1987). In determining whether the exercise of general jurisdiction would be fair and reasonable, the court considers several factors, which include

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[1] The exercise of general personal jurisdiction requires more contact with the forum state than does specific personal jurisdiction because the state has no direct interest in the cause of action.

(1) the forum state's interest in adjudicating the dispute,

(2) the burden on the defendant in defending an action in the forum state,

(3) the plaintiff's interest in securing convenient and effective relief,

(4) judicial efficiency, and

(5) the dictates of interstate federalism.

Bechard v. Constanzo, 810 F. Supp. 579, 586 (D. Vt. 1992); *see also Sollinger v. Nasco Intern., Inc.*, 655 F. Supp. 1385, 1388 (D. Vt. 1987).

In *Bearry v. Beech Aircraft Corp.*, 818 F.2d 370, 376 (5th Cir. 1987), the Circuit Court found that Beech had insufficient contacts with Texas, the forum state, to constitute "doing business" in Texas where the cause of action arose outside of Texas and plaintiff was a nonresident. The Court found that the mere flow of Beech products into Texas did not create a general presence where all of Beech's transactions were completed outside of Texas, Beech had no facilities or agents in Texas, and the exercise of jurisdiction would not be fair or reasonable given the weakness of defendant's contacts. *Beech Aircraft*, 818 F.2d at 377.

In the instant matter, Robertson-Ceco's contacts with Vermont must be analyzed during 1993, the year plaintiff filed the action. In 1993, two of Robertson-Ceco's divisions, Star Building Systems and Ceco Building Systems, sold doors to independent retailers and contractors in Vermont. Although Robertson-Ceco is registered to do business in Vermont, and markets, advertises, and sells its products in

Vermont through independent construction businesses, Robertson-Ceco maintained no office or agents in Vermont, owned no property in Vermont, and exercised no control over its independent dealers. Robertson-Ceco's sales in Vermont totalled approximately $230,000 in 1993, constituting less than .07% of total sales. Such de minimis business contacts do not rise to the continuous and systematic level sufficient to justify assertion of general personal jurisdiction in this suit.

Finally, even were this Court to find Robertson-Ceco's contacts with Vermont to be continuous and systematic, the exercise of general personal jurisdiction would be neither fair nor reasonable under *Asahi*. Plaintiff, a non-resident suing on a cause of action that arose in Florida, has no interest in the lawsuit proceeding in Vermont. No witness or other evidence is located in Vermont, and defendant is a nonresident. The fact that Robertson-Ceco engaged in nation-wide advertising does not, by itself, support a finding of general jurisdiction. *See Beech Aircraft*, 818 F.2d at 376. Further, Florida, the locus of the alleged tort, and New York, plaintiff's domicile, have far more significant interests in resolving the dispute.

Having no interest in either the litigation or the parties, this Court concludes that the exercise of general jurisdiction over Robertson-Ceco would be improper.

Consequently, the Court hereby REAFFIRMS its prior Order granting defendant Robertson-Ceco's motion to dismiss.

SO ORDERED.

Dated at Rutland in the District of Vermont this 5th day of August, 1994.

/s/ Franklin S. Billings, Jr.
Franklin S. Billings, Jr.
District Judge

APPENDIX D

U S DISTRICT COURT
DISTRICT OF VT
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UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

METROPOLITAN LIFE INSURANCE CO.	:	
v.	:	Civil No. 5:93-259
ROBERTSON-CECO CORP. and UNITED DOMINION INDUSTRIES, LTD.	:	

OPINION AND ORDER

By Order dated March 25, 1994 the Court requested the parties to brief the issue of personal jurisdiction and proper venue by April 29, 1994. After additional discovery and several extensions of time, defendant Robertson-Ceco Corp. ("Robertson") filed a memorandum in support of its prior motion to dismiss for lack of personal jurisdiction, pursuant to Fed. R. Civ. P. 12(b)(2). In addition, Robertson filed a reply memorandum in further support of its prior motions for summary judgment and for failure to state a claim upon which relief can be granted, pursuant to Fed. R. Civ. P. 56(b) and 12(b)(6). Plaintiff filed no additional memorandum regarding the issue of jurisdiction, but moved to strike Robertson's reply memorandum, except as to

personal jurisdiction, for failure to file within the limits set forth in Local Rule 5(a)(2).

In general, a court may exercise personal jurisdiction over non-resident defendants only if authorized by state law and if the exercise of jurisdiction meets the requirements of the Due Process Clause of the Constitution. *Bechard v. Constanzo*, 810 F. Supp. 579, 582 (D. Vt. 1992). Vermont's long-arm statute, 12 V.S.A. § 913(b), authorizes general personal jurisdiction over out-of-state defendants "to the full extent permitted by the Due Process Clause." *Id.* at 582-83, *citing Northern Aircraft Inc. v. Reed*, 154 Vt. 36, 40 (1990).

Federal law provides that a foreign corporation may be subject to general in personam jurisdiction in actions unrelated to its activities in a forum is such corporation has sufficient "continuous and systematic" contacts with that forum. *International Shoe Co. v. Washington*, 326 U.S. 310 (1945); *see, e.g. Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406, 413 (9th Cir. 1977). A defendant's contacts with the forum state must be such that the defendant could reasonably anticipate being haled into court there. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (*citing World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). In short, plaintiff bears the burden of proving that a court's exercise of jurisdiction over defendants will not offend "traditional notions of fair play and substantial justice." *International Shoe*, 326 U.S. at 316.

In the present case, the Court must examine the nature and quality of Robertson's contacts with Vermont to determine whether they are sufficiently continuous and systematic as to warrant assertion of personal jurisdiction. *See Helicopteros Nacionales de Columbia v. Hall*, 466 U.S. 408, 414 n.9 (1984). Where defendant's relationship with

the forum stems from unilateral, fortuitous, or attenuated contacts, jurisdiction is improper. Prior to 1993, two of Robertson's divisions, Star Building Systems and Ceco Building Systems, sold doors to independent retailers and contractors in Vermont. Robertson-Ceco's salesmen solicited sales in Vermont which totalled approximately $230,000 in 1993, and constituted less than .07% of its total sales. Such de minimis business contacts are insufficient to justify assertion of personal jurisdiction in Vermont.[1]

Consequently, the Court hereby GRANTS defendant Robertson's motion to dismiss. Plaintiff's motion to strike is hereby MOOT.

SO ORDERED.

Dated at Rutland in the District of Vermont this 29th day of July, 1994.

/s/ Franklin S. Billings, Jr.
Franklin S. Billings, Jr.
District Judge

---

[1] The Court notes that Vermont is totally unrelated to the cause of action and appears to have been chosen for its six-year statute of limitations for general civil actions. While it is not necessary that the cause of action being asserted arise out of defendant's contacts with the forum, parties are strongly discouraged from forum-shopping to avoid shorter statutes of limitations.

APPENDIX E

U S DISTRICT COURT
DISTRICT OF VT
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UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

METROPOLITAN LIFE INSURANCE CO.	:	
v.	:	Civil No. 5:93-259
ROBERTSON-CECO CORP. and UNITED DOMINION INDUSTRIES, LTD.	:	

ORDER

Plaintiff Metropolitan Life Insurance Co. ("MetLife") seeks to depose defendant Robertson-Ceco Corp. ("Robertson") in order to brief the issue of personal jurisdiction as requested by the Court in its Order dated March 25, 1994. On March 30, 1994 Robertson moved the Court to issue an order either (a) prohibiting the deposition of Robertson's representative, or (b) limiting the scope of such deposition. Plaintiff filed opposition on April 14, 1994.

A protective order is appropriate where discovery maybe unduly burdensome and overly broad. Fed. R. Civ.

P. 26(c). The Court finds in this case that proposed deposition questions concerning defendant's business contacts are overly broad.

Consequently, the Court hereby GRANTS defendant's motion in part and further ORDERS plaintiff to limit the scope of its deposition to the period 1987 through 1993.

SO ORDERED.

Dated at Rutland in the District of Vermont this 20th day of April, 1994.

/s/ Franklin S. Billings, Jr.
Franklin S. Billings, Jr.
District Judge

APPENDIX F

CONSTITUTION OF THE UNITED STATES

AMENDMENT V –GRAND JURY INDICTMENT FOR CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS OF LAW; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX G

CONSTITUTION OF THE UNITED STATES

AMENDMENT XIV–CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties or services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Supreme Court, U.S.
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No. 96-306

In The

Supreme Court of the United States

October Term, 1995

METROPOLITAN LIFE INSURANCE COMPANY,

Petitioner,

v.

ROBERTSON-CECO CORP.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the majority below err in applying "reasonableness" factors above and beyond its finding that there were systematic and continuous contacts between the defendant and Vermont in concluding that the Vermont district court lacked *general* jurisdiction over the defendant under the Due Process Clause of the United States Constitution?

2. Is the decision of the majority below in conflict with the decisions of other federal and state courts in defining the constitutional limits on *general* jurisdiction?

3. Did the majority below err in failing to use transfer of venue to ameliorate any concerns relating to the forum's fairness and litigation convenience rather than dismissal, once it determined that defendant's contacts satisfied the minimum contacts requirement of the due process test?[1]

4. Did the majority below err in superimposing anti-forum shopping concerns in addition to the constitutional limitations on the exercise of jurisdiction established by this Court?

---

[1] The formulation of this question in the Petition incorrectly implies that the lower court found the defendant to have "constitutionally sufficient contacts." The reformulation of the question tracks the language of the opinion below which held that the "minimum contacts requirement of the due process test" had been met. *See*, Opinion, App. at 23(a).

INTERESTED PARTIES

The Petitioner is Metropolitan Life Insurance Company.

The Respondent is Robertson-Ceco Corporation.

United Dominion Industries, Inc. was dismissed by summary judgment on March 4, 1995, and was not a party to the appeal below, nor is it an interested party to these proceedings.

There is no parent company to the Respondent and other than wholly owned subsidaries, it has no subsidiaries.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent requests that the Court deny the Petition for a Writ of Certiorari seeking review of an opinion of the Court of Appeals for the Second Circuit. The Court of Appeal's opinion is reported at 84 F.3d 560 and reproduced in the Appendix to the Petition for a Writ of Certiorari at 1a - 35a and the opinions of the district court are unreported and reproduced in the Appendix of the Petition at 36a - 47a. (For the convenience of the Court, all citations to the opinion will be to the opinion attached as Appendix A to the Petition.)

JURISDICTION

The court of appeals entered its judgment on May 22, 1996. (App. 1a.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

For purposes of its response to the Petition for a Writ of Certiorari, Respondent adopts the Petitioner's Statement of the Case, except it corrects misstatements in the Petition as follows:

1. It does not admit, for any purpose, the accuracy of the factual statements in the first two paragraphs of Petitioner's Statement of the Case and observes that the factual assertions therein do not bear on the issues presented in the Petition.

2. It does not agree with all of the assertions in the paragraph beginning on page 2 and continuing on page 3 of the Petition and states that the description contained in the opinion below (App. at 6a-7a) sufficiently describes the allegations below with respect to Respondent's contacts with Vermont.

3. It does not agree with the statement on page 4 of the Petition that Respondent had "substantial" minimum contacts in Vermont.

4. It disagrees with the statement at p. 4 of the Petition that "The [lower] court based its conclusion on the lack of a relationship of the subject matter of the case to Vermont and the Vermont contacts of MetLife and Robertson-Ceco" and instead refers to the opinion below (App. 1a - 35a) which clearly elucidates the basis for the lower court's conclusions.

REASONS FOR DENYING THE PETITION

I. BECAUSE PETITIONER SUSTAINED NO LOSS OF A CONSTITUTIONALLY PROTECTED RIGHT BY THE DECISIONS BELOW, THERE IS NO COMPELLING REASON TO GRANT CERTIORARI

The trial court's dismissal of the Petitioner's complaint pursuant to Federal Rule of Civil Procedure 12(b)(2) for lack of personal jurisdiction over Respondent, affirmed after *de novo* review by the Second Circuit, deprived Petitioner of no constitutional or statutory right to have its Florida based claim adjudicated in Vermont. The discretionary grant of certiorari jurisdiction will be made only for "compelling reasons," Supreme Court Rule

10, in consideration of the fact, among others, that this Court "cannot function as an ordinary appellate court concerned with achieving individual justice in individual cases."[2] 16 Wright, Miller, Cooper & Grossman, Federal Practice and Procedure: Jurisdiction § 4004 at 507. Because Petitioner lost no constitutional or statutory right by reason of the Second Circuit's holding below, this case is an inappropriate candidate for certiorari.

In contrast, the opposite decision by the trial and appeal courts would create a compelling reason for the grant of certiorari on a petition brought by Respondent, since the constitutional right of due process is implicated when a court exercises personal jurisdiction over a foreign defendant. In fact, with the exception of *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984), this Court has never granted certiorari in a case like this one in which none of the lower courts considering the case have held that a foreign defendant was subject to *in personam* jurisdiction. Moreover, the result in *Keeton*, is easily explained with reference to *Calder v. Jones*, 465 U.S. 783 (1984), argued and decided the same day. Both *Keeton* and *Calder* involved libel actions, testing state court jurisdiction over foreign publishers whose allegedly libelous stories had "effects" in state. The California Court of Appeal and the

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[2] Petitioner's claims are likely time barred in all potential fora. The consequence of the operation of statutes of limitations may be of enormous significance to Petitioner, but does not, as explained in the opinion of the Second Circuit below, lend constitutional significance to the Petitioner's claims herein. *See*, App. 26a-27a.

First Circuit applying New Hampshire law, reached contrary results, a situation fitting squarely within the guidelines of Supreme Court Rule 10(b). Therefore, certiorari should not be granted in this matter since there is no compelling reason presented where both the trial court and the appeals court find no jurisdiction.

II. THE DUE PROCESS REASONABLENESS STANDARD APPLIES TO THE ASSERTION OF PERSONAL JURISDICTION IN BOTH SPECIFIC AND GENERAL JURISDICTION CASES[3], AND THERE IS NO DISHARMONY AMONG THIS COURT'S OPINIONS IN *INTERNATIONAL SHOE, PERKINS, WORLD-WIDE VOLKSWAGEN, HELICOPTEROS, BURGER KING* AND *ASAHI* TO THAT EFFECT

Contrary to Petitioners assertion that this Court's opinions in *International Shoe, Perkins, World-Wide Volkswagen, Helicopteros, Burger King* and *Asahi* are disharmonious, those opinions (and others) consistently and uniformly have held that due process requires an independent fairness or reasonableness test, in addition to a threshold minimum contacts test, in all cases where *in personam* jurisdiction is asserted over a non-resident defendant. *International Shoe Co. v. Washington*, 326 U.S. 310 (1945) affirmed this Court's prior holdings that a certain level of contacts between a non-resident defendant and the forum state was essential to an assertion of

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[3] Specific personal jurisdiction is exercised over claims arising out of, or related to, the foreign defendant's forum based contacts, and general personal jurisdiction is exercised as to a controversy not related to the foreign defendant's forum based contacts.

jurisdiction but rejected the concept that jurisdiction could be established by application of a mechanical or quantitative test, such as a minimum contacts test, alone:

> The test is not merely, as has sometimes been suggested, whether the activity [of a non resident defendant] in another state is a little more or a little less. . . . Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure.

Id. at 319 (citation omitted). Thus, *International Shoe* established the ultimate due process test of personal jurisdiction as whether the contacts of the defendant, having satisfied the threshold, quantitative minimal contacts test, are of a qualitative nature sufficient to make an assertion of jurisdiction "reasonable and just according to our traditional conception of fair play and substantial justice." *Id.* at 320.

International Shoe was a "specific" jurisdiction case, that is, the cause of action in that case arose from or was related to the defendant's contacts with the forum. There is no merit, however, to Petitioner's suggestion that this Court's holding in *International Shoe*, establishing the reasonableness test, is limited to specific jurisdiction cases. Nothing in the Court's opinion suggests any such limitation. Moreover, any question to that effect was resolved by the Court's opinion in *Perkins v. Benquet Mining Co.*, 342 U.S. 437, *reh'g denied* (1952).

In *Perkins* this Court held that due process did not prohibit an assertion of jurisdiction over a non-resident

defendant where the cause of action did not arise out of the defendant's activities in the forum state if the defendant had "continuous and systematic" contacts with the forum state. Referencing *International Shoe*, this Court observed that in the "general" jurisdiction[4] setting of *Perkins*, the constitutional issue was, like in *International Shoe*, "one of general fairness" to the defendant. *Id.* at 445. *Perkins* held that the "appropriate tests" for general fairness were as set forth in the *International Shoe* opinion, observing that

> The amount and kind of activities which must be carried on by the foreign corporation in the state of the forum so as to make it reasonable and just to subject the corporation to the jurisdiction of that state are to be determined in each case.

Id. Having found that the defendant in *Perkins* met the minimal contacts test of "continuous and systematic" activities in the forum state, *id.* at 438, this Court proceeded to apply the reasonableness test and determined that the contacts of the defendant were "sufficiently substantial and of such a nature," *id.* at 447, that assertion of jurisdiction would not violate due process. *Id.* at 448.

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[4] The distinction between general and specific jurisdiction cases is irrelevant to whether the reasonableness inquiry enunciated in *International Shoe* must be conducted. A determination whether an assertion of jurisdiction is "specific" or "general" relates only to which minimal contacts test is applicable. Thus *Perkins* is not, as claimed by Petitioner, a separate line of authority, but is part of the progeny of *International Shoe*.

Thus, the Petitioner incorrectly asserts that this Court has previously "used a 'reasonableness' component only in specific jurisdiction cases." Petition, 9. Furthermore, the petition misstates the holding of the court below, and the law, when it states at p. 6 that the "majority below expressly recognized the absence of Supreme Court authority for the employment of a 'reasonableness' test in a *general* jurisdiction case." In fact, the opinion below stated that "the Supreme Court has not had occasion to *conduct* the reasonableness inquiry in a general jurisdiction case, App. 23(a). In *Perkins*, this Court both held that due process required the employment of a "reasonableness" test and proceeded to conduct such a test.

Subsequently, in *Kulko v. California Superior Court*, 436 U.S. 86 (1978), this Court citing both *International Shoe* and *Perkins*, held that "an essential criterion in *all* cases is whether the 'quality and nature' of the defendant's activity is such that it is reasonable and fair to require him to conduct his defense in [the forum] state." *Id.* at 92. (Emphasis supplied), (citations omitted). *Kulko*, like *Perkins*, involved a cause of action unrelated to the defendant's contacts with the forum. *Id.* at 97.[5]

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[5] In addition to the cases cited above, this Court has affirmed the application of the *International Shoe* bifurcated minimum contacts/reasonableness tests in the following cases, all of which involved a cause of action unrelated to the foreign defendant's contacts with the forum state: *Hanson v. Denkler*, 357 U.S. 235 (1958); *Shaffer v. Heitner*, 432 U.S. 186, 212 (1977) ("all assertions of state court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny"); and *Rush v. Savchuk*, 444 U.S. 320, 332 (1980).

The principle that due process demands an independent reasonableness test was confirmed again by the Court in *Burger King v. Rudzewicz*, 471 U.S. 462 (1955). While the Court affirmed the reasonableness of the assertion of jurisdiction on the facts of that specific jurisdiction case, the opinion specifically observes that the "concept of 'fair play and substantial justice' may defeat the reasonableness of jurisdiction even if the defendant has purposefully engaged in forum activities," *id.* at 477, and confirms that an independent fairness test must be conducted after it is determined that minimum contacts have been established. *Id.* at 476.

The opinion of the Court in *Asahi Metal Industry Co. Ltd. v. Superior Court of California*, 480 U.S. 102 (1987), further confirms the due process requirement of an independent reasonableness test. In that case a majority of this Court determined that the reasonableness inquiry defeated the jurisdictional assertion despite the fact that the Court was unable to reach a majority opinion as to whether the minimal contacts test had been met. *Id.* at 114.

There is no merit to the Petitioner's contention that a writ of certiorari should be granted to decide whether due process requires an independent reasonableness inquiry in a general jurisdiction case. If there was ever a question to that effect, the issue was settled in the affirmative by *Perkins*, and has been repeatedly confirmed by this Court since that case.

Nor, as suggested by Petitioner, is there any disharmony among the Court's decisions in *International Shoe, Perkins, World-Wide Volkswagen, Helicopteros, Burger King* and *Asahi* as to the due process analysis to be applied to *in personam* jurisdiction cases. The opinions in each of those cases consistently have held that the two-part jurisdictional test set forth in *International Shoe* applies to all *in personam* cases and that due process requires the application of the reasonableness test. In addition, *World-Wide Volkswagen Corp v. Woodson*, 444 U.S. 286 (1980) and *Helicopteros Nacionales de Columbia v. Hall*, 466 U.S. 408 (1984) serve to establish that the minimum contacts and reasonableness tests are independent of each other. Hence in *World-Wide Volkswagen, supra* at 293-94, the Court affirmed, in a specific jurisdiction case, that the absence of minimal contacts forecloses the jurisdictional inquiry no matter how reasonable the assertion of jurisdiction might otherwise be considered. A similar conclusion was reached by the Court in a general jurisdiction setting in *Helicopteros*. Neither of those opinions suggests that the need for a reasonableness test would be eliminated where minimum contacts were established. *See also, Rush v. Savchuk*, 444 U.S. at 322.

Because this Court has decided and repeatedly affirmed that due process requires application of the reasonableness test in all cases, including general jurisdiction cases, even if the applicable minimum contacts test has been met, there is no reason to grant certiorari to consider the issue again.

III. THE DECISION OF THE COURT BELOW DOES NOT CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEALS OR WITH STATE COURT DECISIONS ON THE PROPER DUE PROCESS STANDARD APPLICABLE IN GENERAL JURISDICTION CASES.

Since *International Shoe* was decided, no Court of Appeals has held that a reasonableness test need not be applied in general jurisdiction cases. Petitioner is incorrect in its conclusion that *Crane v. Carr*, 814 F.2d 758 (D.C.Cir.1987), *Schreiber v. Allis-Chalmers Corp.*, 611 F.2d 790 (10th Cir.1979) and *Behagen v. Amateur Basketball Association of the United States of America*, 744 F.2d 731(10th Cir.1984) evidence conflict among the Circuit Courts on that subject.

The *dicta* in *Crane v. Carr*, upon which Petitioner relies, states only that jurisdiction *may* be found in a general jurisdiction setting if the court determines the non-resident defendant has operated "so continuously and substantially" in the forum state as to render a jurisdictional assertion "fair" without regard to where the claim arose. Far from constituting a rejection of the application of a due process fairness (reasonableness) test, the passage from *Crane* cited by the Petitioner specifically acknowledges, in agreement with the decision below, that the fairness test applies in general jurisdiction cases.

Similarly, the two opinions of the Tenth Circuit Court of Appeals cited by Petitioner do not conflict with this Court's holdings or the decision below that due process requires the application of a separate reasonableness test in general jurisdiction cases. Both Tenth Circuit cases, in fact, recognize that an independent reasonableness test

must be applied, but hold that due process does not require the evaluation of particular "reasonableness" factors. Thus, the *Schrieber* decision correctly holds, consistent with this Court's decision in *Perkins*, that due process does not prohibit assertion of jurisdiction in a general jurisdiction setting and that the reasonableness inquiry is satisfied if the Court concludes that the contacts of the defendant are sufficient to conclude that the defendant is "present" in the forum. Likewise, the *Behagen* opinion of the 10th Circuit holds, in effect, that the reasonableness test is met by a showing that the defendant has maintained "continuous" and *"substantial"* activity in the forum state. 772 F.2d at 734. (Emphasis added). Subsequent decisions in the Tenth Circuit also confirm that a separate reasonableness inquiry is part of the test for all questions of personal jurisdiction. *E.g., Kennedy v. Freeman*, 919 F.2d 126 (10th Cir.1990). In *Kennedy*, the court reported:

> We maintain the following general constitutional test for the exercise of personal jurisdiction: A federal court sitting in diversity may exercise personal jurisdiction over a non-resident defendant only so long as there exists minimum contacts between the defendant and the forum state. The defendant's contacts with the forum state must be such that maintenance of the suit does not offend traditional notions of fair play and substantial justice.

919 F.2d at 128. (Internal quotations omitted), (citations omitted). *See also, Far West Capitol, Inc. v. Towne*, 46 F.3d 1071, 1074 (10th Cir.1995); *Rambo v. American Southern Ins. Co.*, 839 F.2d 1415, 1417 (10th Cir.1988).

Thus, if Petitioner asserts that there is a split among the circuit courts as to whether due process requires the application of an independent reasonableness test in general jurisdiction cases, the assertion is based on a misperception. It is true that the decisions in *Schreiber* and *Behagen* employ a different methodology in applying the reasonableness test than does the decision below. But this Court has observed, at least since its decision in *Perkins*, that both "the amount and kind of activities which must be carried on by the [defendant] in the state of the forum so as to make it reasonable and just to subject the [defendant] to the jurisdiction of that state are to be determined in each case." 342 U.S. at 445. Hence, this Court has never required that any particular factor (with the possible exception of the burden on the defendant, see *International Shoe*, 326 U.S. at 317) be considered in evaluating whether an assertion of jurisdiction in a particular case is reasonable.[6]

Because this Court has consistently recognized that the differing facts of each case will determine the appropriate methodology to be applied in assessing reasonableness, the fact that the decision below adopts a different methodology than that selected by other circuits as appropriate to different cases does not warrant granting certiorari in this case. The concepts of "fairness," "reasonableness" and the "orderly administration of laws" inherent in "traditional concepts of fair play and substantial justice," are not susceptible of reduction to a fixed, mechanical evaluation process. *See International Shoe*, 326

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[6] E.g., *Burger King* states that courts "may" consider certain reasonableness factors in "appropriate" cases. 471 U.S. at 476.

U.S. at 319. A grant of certiorari for the purpose of attempting to formulate a fixed, mechanical reasonableness test would be futile.[7]

Because the factors to be considered in evaluating the reasonableness of an assertion of jurisdiction are dependant upon the facts of a particular case, the weight to be accorded any particular factor is, likewise, a matter of discretion for the lower courts. The Second Circuit in this case determined that it would not consider the implications arising from the fact that Petitioner's claim might be

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[7] See dissent of Justice Marshall in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. at 313:

> For over 30 years the standard by which to measure the constitutionally permissible reach of state-court jurisdiction has been well established:
>
> > "[D]ue process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " *International Shoe, Co. v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95 (1945), quoting *Miliken v. Meyer*, 311 U.S. 457, 463, 61 S.Ct. 339, 342, 85 L.Ed. 278 (1940).
>
> The corollary, that the Due Process Clause forbids the assertion of jurisdiction over a defendant "with which the state had no contacts, ties, or relations," 326 U.S., at 319, 66 S.Ct., at 160, is equally clear. The concepts of fairness and substantial justice as applied to an evaluation of "the quality and nature of the [defendant's] activity," *ibid.*, are not readily susceptible of further definition, . . .

barred in every state except Vermont by applicable statutes of limitation in its conduct of the reasonableness test. That decision, while consistent with the Court's decision in *Keeton v. Hustler Magazine, Inc.* is, the Petitioner argues, at variance with decisions of the 11th Circuit in *Madara v. Hall,* 916 F.2d 1510 (11th Cir.1990) and the Louisiana Supreme Court in *Reyes v. Marina Management and Consulting, Ltd.* 586 S.2d 103 (La.1991). While it is not clear whether the 11th Circuit and the Louisiana Supreme Court placed any weight on their observations that the "statute of limitations may have run in other potential fora," *Madara,* 916 F.2d at 1519; *Reyes,* 586 S.2d at 114; such discretionary decisions do not call for the grant of a writ of certiorari in this case.

There is, in summary, no reason to grant certiorari because the opinion below does not create or evidence a split of authority between the Second Circuit Court of Appeals and any other circuit court or state court.

IV. CERTIORARI SHOULD NOT BE GRANTED SO AS TO IMPORT VENUE CONSIDERATIONS INTO THE JURISDICTIONAL "REASONABLENESS" ASSESSMENT.

The decision below does not, as petitioner asserts, conflict with this Court's *Burger King* opinion. *Burger King* observed that a transfer of venue might alleviate concerns of inconvenience to a defendant and avoid the need to dismiss a case on constitutional grounds. 471 U.S. at 477. The court below acknowledged the *Burger King* admonition and correctly observed that mere convenience considerations should not be conflated with the due process

concepts of fair play and substantial justice, see *id.* at 477, 78. (Despite the fact that "most" inconvenience concerns "usually" may be accommodated by a change of venue, "minimum requirements inherent in the concept of fair play and substantial justice may defeat the reasonableness of jurisdiction . . . ") (internal quotations omitted). As further pointed out by the lower court, its decision that due process reasonableness constraints demanded the dismissal of this case was based on more than a conclusion that subjecting Respondent to personal jurisdiction would be merely inconvenient. *See* App. 29a.[8] The decision below reflects a careful consideration and application of the *Burger King* opinion, rather than confusion concerning the relationship between due process concern and the lesser principles invoked by transfer of venue and *forum non conveniens* considerations.

Likewise, neither the opinion below, the decision of the First Circuit in *Foster-Miller, Inc. v. Babcock & Wilcox Canada*, 46 F.3d 138 (1st Cir.1995), nor the decision of the Fifth Circuit in *Villar v. Crowley Maritime Corp.* (5th Cir.1993) evidence a split of authority with the Third

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[8] The Second Circuit made this clear:

> The present case is not one in which subjecting Robertson to jurisdiction in Vermont would merely be inconvenient; Met Life's interest in pursuing its action in Vermont and Vermont's interest in adjudicating the case are so attenuated, if not nonexistent, that the exercise of personal jurisdiction would violate our basic sense of "fair play and substantial justice" – and deprive the defendants of the due process guaranteed by the Constitution.

App. 29a

Circuit decision in *Mescalic v. Fiberfloat Corp.*, 897 F.2d 696 (3rd Cir.1990) or the Ninth Circuit decision in *Corporate Inv. Business Brokers v. Melcher*, 824 F.2d 786 (9th Cir.1987). *Foster-Miller* and *Villar* were relied upon by the majority below to point out that the existence of personal jurisdiction is a fundamental issue not to be confused with the common law doctrine of *forum non conveniens* or the federal venue statute, 28 U.S.C. § 1404.[9]

Consistent with *Foster-Miller* and *Villar*, the decisions in *Mescalic* and *Melcher* hold that jurisdiction is an issue preeminent to venue preferences. *Melcher*, 824 F.2d at 791 (commenting that as to the defendant's complaint about litigating in an inconvenient forum, " . . . any inconvenience Melcher might suffer from travel certainly does not rise to the level of a due process violation."); *Mescalic*, 897 F.2d at 701 (" . . . we do not believe that litigation in New Jersey would impose an unfair burden on Fiberfloat. The proper means to resolve the competing forum preferences of the parties may be through a motion for change of venue. *See* 28 U.S.C. § 1404(a) (1982). Jurisdictional issues *are not to be confused with* section 1404(a) motions."). What Petitioner has pointed out as alleged inconsistency in the role given to a party's forum preference as a factor in jurisdictional analysis, is in reality no

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[9] It should also be noted that in 1988 the federal venue statute was amended to the current language: "for the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division **where it might have been brought**." 28 U.S.C. § 1404 (a) (emphasis supplied). Amendment of the venue statute made clear Congress' intent that the venue "cart" not precede the jurisdiction "horse."

more than different courts faced with different facts reaching different conclusions about the implication of the respective facts in each case on the fairness of a personal jurisdiction assertion. *Mescalic, Melcher, Foster-Miller,* and *Villar* all concur that jurisdiction is a preeminent issue to a transfer of venue.

V. THE OPINION BELOW PROPERLY OBSERVED THAT FORUM PREFERENCES OF THE PLAINTIFF PLAY NO ROLE IN THE JURISDICTIONAL ANALYSIS

The Petitioner's assertion that the opinion below "focuses on forum shopping concerns" is patently incorrect. Petition, 19-20. Instead the lower court, citing *Keeton,* specifically refused to incorporate forum shopping concerns into its analysis of the reasonableness of exercising jurisdiction. App. 26a-27a. ("If choice-of-law considerations cannot be invoked by the defendant to demonstrate the unreasonableness of exercising jurisdiction, they likewise should not complicate our analysis of the plaintiff's interest in proceeding in Vermont.")

Thus, the opinion below, having properly applied the dictates of this Court as to the role of forum shopping concerns in the reasonableness analysis of exercising jurisdiction, provides no reason for granting certiorari.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

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NO. 96-306

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

Metropolitan Life Insurance Company,
Petitioner,
v.
ROBERTSON-CECO CORP.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONER'S REPLY BRIEF

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QUESTIONS PRESENTED

1. Did the majority below err in applying "reasonableness" factors above and beyond its finding that there were systematic and continuous contacts between the defendant and Vermont in concluding that the Vermont district court lacked *general* jurisdiction over the defendant under the Due Process Clause of the United States Constitution?

2. Is the decision of the majority below in conflict with the decision of other federal and state courts in defining the constitutional limits on *general* jurisdiction?

3. Did the majority below err in failing to use transfer of venue to ameliorate any concerns relating to the forum's fairness and litigation convenience rather than dismissal, once it determined that the defendant had constitutionally sufficient contacts with Vermont?

4. Did the majority below err in superimposing antiforum shopping concerns in addition to the constitutional limitations on the exercise of jurisdiction established by this Court?

PARTIES TO THE PROCEEDINGS

The original parties to this lawsuit included: (1) Metropolitan Life Insurance Company; (2) Robertson-Ceco Corp.; and (3) United Dominion Industries, Inc. Summary judgment was granted in favor of United Dominion on March 14, 1995. It was not a party to the appeal below, nor is it an interested party here.

There is no parent company of the petitioner. Petitioner's subsidiaries (other than wholly owned subsidiaries) are these:

Blodgett Holdings, Inc.
Briggs Holdings, Inc.
Briggs Plumbing Products, Inc.
Cicero/Cermak Corporation
Cloverleaf Properties, Inc.
Coating Technologies International, Inc.
Dan River, Inc.
Frialator International, Limited
Genesis Seguros Generales, Sociedad Anonima
De Seguros Y Reaseguros
GS Blodgett Corporation
GS Blodgett Inc.
GS Blodgett International LTD.
Kolon-Met Life Insurance Company
Magikitch'N, Inc.
Metropolitan Lloyds Insurance Company of Texas
Metropolitan Structures
Metropolitan Structures, Inc.
Metropolitan Structures West, Inc.
Morguard Investments Limited
MS Management Services, L.P.
Pitco Frialator, Inc.
Santander Met, S.A. (Mexico)

Seguros Genenis, S.A. (Spain)
State Street Research Portfolios, Inc.

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Metropolitan Life Insurance Company respectfully submits this reply brief in support of its petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

REPLY TO OPPOSITION BRIEF

I. As Stated In *Burnham*, *International Shoe* Neither Rejected The Underlying Bases For Traditional Jurisdiction Theories, Nor Did It Add To Those Bases A Supervening Reasonableness Test

Robertson-Ceco's assertion that *International Shoe* and subsequent cases have consistently and uniformly held that due process requires an independent fairness or reasonableness test, simply is untrue. That position is flatly contradicted by *Burnham v. Superior Court of California*, 495 U.S. 604 (1990), in which the Court held that the Due Process Clause permitted a California state court to exercise jurisdiction over a nonresident, who was personally served with process while temporarily in that State, in a suit unrelated to his activities in the State. Justice Scalia delivered an opinion in which Chief Justice Rehnquist, and Justice Kennedy concurred, and in which Justice White concurred in part. In his opinion, Scalia rejected outright the necessity of conducting an independent inquiry into the desirability or fairness of the prevailing in-state service rule. He relied instead on American jurisdiction tradition, and a number of pre- *International Shoe* cases upholding jurisdiction over nonresidents simply on the basis of physical presence in the State. Speaking of the in-state service rule, Justice Scalia remarked that "its validation is its pedigree, as the phrase '*traditional notions* of fair play and substantial justice makes clear.'" *Id.* at 621. The Justice warned against substituting other notions for our "traditional notions of fair play and substantial justice." *Id.* at 623. To hold otherwise, he said, would result in "a 'totality of the circumstances' test, guaranteeing what traditional territorial

rules of jurisdiction were designed precisely to avoid: uncertainty and litigation over the preliminary issue of the forum's competence." ***Id.*** at 626. Such a test is also unnecessary, said Justice Scalia, since physical presence is "the very ***baseline*** of reasonableness." ***Id.***, at 627.

Since ***Burnham*** addressed the propriety of the traditional imposition of jurisdiction only with respect to an individual personally served within the State, it is important that this Court clarify the extent to which its opinion gives continuing vitality to the traditionally recognized bases for jurisdiction over corporations. This is important since several traditional bases exist for jurisdiction over a corporation that do not involve a secondary reasonableness inquiry, such as that conducted by the majority below.[1] For instance, jurisdiction traditionally has been imposed on corporations on the basis of theories relative to "consent," "presence," and "doing business." ***See, e.g., Lafayette Insurance Co. v. French,*** 59 U.S. 404, 407 (1855); ***Philadelphia and Reading R.R. v. McKibbin***, 243 U.S. 264, 265 (1917). Robertson-Ceco was served through its registered agent in Vermont. Robertson-Ceco also conducted a substantial amount of business there, as acknowledged by the Second Circuit. Whether the Court of Appeals was justified in exercising what was in essence a secondary "totality of the circumstances" inquiry, notwithstanding Metlife's satisfaction of these other traditionally recognized bases of jurisdiction is a question that, if unanswered, will

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[1] Of particular significance in this context are the remarks of Justice Scalia that the evils accompanying a freestanding reasonableness inquiry, must be accepted, if at all, only when the Court "evaluates *non*traditional forms of jurisdiction newly adopted by the States." ***Burnham***, at 495, citing as an example ***Asahi Metal Industry Co. v. Superior Court of California, Solano County***, 480 U.S. 102 (1987).

cause much confusion in the area of personal jurisdiction.[2] This confusion is compounded by the lack of any clarity regarding the relationship between these traditional bases of jurisdiction and the concept of *general* jurisdiction based on "continuous and systematic contacts."

The existing authority suggests that, with respect to corporations, "continuous and systematic contacts" are the surrogate for physical presence in a *general* jurisdiction case. ***See, e.g., International Shoe Co. v. Washington*** 326 U.S. 310, 316 (1945) ("Since the corporate personality is a fiction, . . . it is clear that unlike an individual its 'presence' without . . . the state of its origin can be manifested only by activities carried on in its behalf . . . ."); ***Burnham***, at 610, n.1 ("It may be that whatever special rule exists permitting 'continuous and systematic' contacts, (citing ***Perkins v. Benguet***, 342 U.S. 437, 438 (1952)), to support jurisdiction with respect to matters unrelated to activity in the forum applies *only* to corporations, which have never fitted comfortably in a jurisdictional regime based primarily upon 'de facto power over the defendant's person.'"). As recognized in ***International Shoe,*** there have been cases that have recognized, without resort to a secondary reasonableness analysis, that a foreign corporation's continuous operations in a forum justified the imposition of jurisdiction against it on causes of action arising from dealings entirely distinct from those activities. ***Id.*** at 318,

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This confusion results in part because, although ***International Shoe*** recognized that "[d]ue process does not necessarily require the States to adhere to the unbending territorial limits on jurisdiction set forth in *Pennoyer*," ***Burnham***, at 618, it did not hold that the underlying bases for the traditional corporate fictions were no longer sufficient to establish jurisdiction. ***Id.***, at 619. This principle was neither recognized nor addressed by the majority below.

citing ***Missouri, K. & T. R. Co. v. Reynolds,*** 255 U.S. 565 (1921), and ***St. Louis S. W. R. Co. v. Alexander***, 227 U.S. 228 (1913), among other cases. Robertson-Ceco's continuous and systematic contacts with Vermont, outlined on pages 2 and 3 of Metlife's petition, accepted by the court below (App. 6a-7a)[3], and neither contested nor responded to in Robertson-Ceco's response to the petition, are at least the equivalent to presence, doing business, and indeed, corporate domicile. Guidance from this Court is needed as to whether these constitutionally sufficient "continuous and systematic contacts,"(App. 30a - 31a), furnish a similar *baseline* of reasonableness in a *general* jurisdiction case against a corporation as did an individual's physical presence in ***Burnham***, rendering unnecessary and inappropriate the independent reasonableness determination conducted below.

Robertson-Ceco's response, consisting largely of repetitive snippets (wrenched out of context) from *specific* jurisdiction cases, glosses over these concepts entirely and fails to even join issue with the petition. Although Robertson-Ceco refers to ***Perkins*** (for the observation that the issue of jurisdiction is "one of general fairness"), it avoids the fact that Benguet's continuous and systematic corporate activities, like Burnham's physical presence, made it fair and reasonable to impose jurisdiction over the defendant without further inquiry. Respondent refuses to acknowledge or otherwise deal with the fact that the multi-prong supervening reasonableness inquiry did not appear in this Court's jurisprudence until ***World-Wide Volkswagen v.***

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[3] Reference is made to the appendix accompanying the petition.

Woodson, 444 U.S. 286 (1980),[4] that the test is fundamentally and substantively distinct from the traditional concepts of reasonableness underlying our laws generally that the test has been employed only to defeat jurisdiction in a limited number of *specific* jurisdiction cases, and that the test never has been used to defeat *general* jurisdiction, when it otherwise would have existed. Peculiar also is Robertson-Ceco's stilted refusal to recognize the conflicts among the state and federal courts concerning the application of a supervening reasonableness inquiry in the *general* jurisdiction context, notwithstanding that this conflict has been expressly recognized by the Louisiana Supreme Court in ***Reyes v. Marine Management Consulting, Ltd.***, 586 So.2d 103 (1991), a case that Robertson-Ceco totally ignored.[5] Almost as if attempting to will away *general* jurisdiction by ignoring it, Robertson-Ceco also fails to address ***Helicopteros Nationales de Colombia, S.A. v. Hall***, 466 U.S. 408 (1984), which validated the dichotomy between general and specific jurisdiction cases.[6]

4

Robertson-Ceco's attribution of a bifurcated minimum contacts / reasonableness test to the opinion in ***International Shoe*** (response brief, p.7, n.5), is incorrect.

5

Robertson-Ceco's attempt to harmonize the Second Circuit's opinion in this case with Tenth Circuit *general* jurisdiction cases, by reference to three Tenth Circuit cases on *specific* jurisdiction, is unconvincing.

6

Ironically, Robertson-Ceco's cross petition acknowledges that contacts with the forum over time create a corporate presence. The cross-petition shows how important it is for the Court to speak once again on what it meant in ***Perkins*** and ***Helicopteros*** and what the relationship is of those cases to both the traditional bases of jurisdiction and *specific* jurisdiction.

Robertson-Ceco's failure to join issue is further proof that this case warrants certiorari. The confusion regarding the application of a secondary reasonableness inquiry in the *general* jurisdiction context is manifest, especially as applied to corporations. This case offers the Court an opportunity to complete the analysis it began in ***Burnham*** and restore order and predictability to the jurisdictional inquiry. The opportunity should be seized before the subject becomes further obscured by poorly reasoned opinions, like the one issued by the court below.

II. Metlife Is Entitled To Proper Due Process Clause Interpretation

One can only marvel at Robertson-Ceco's assertion that this court should not grant certiorari, because neither the District Court nor the Court of Appeals found jurisdiction to exist. Only with the sheerest unsupported speculation imaginable does Robertson-Ceco attempt to distinguish ***Keeton v. Hustler Magazine, Inc.*** 465 U.S. 770 (1984), in which, as in this case, neither the District Court nor the Court of Appeals found jurisdiction to exist. Moreover, Robertson-Ceco has entirely overlooked ***Perkins***, in which neither the trial court, the intermediate appellate court nor the Ohio Supreme Court found jurisdiction to exist.

This case presents the Court with basic questions concerning the application of the Fourteenth Amendment to the Constitution. Only this Court can answer them, and nothing turns on the fact that the courts below interpreted the Constitution to preclude the assertion of jurisdiction.

III. The Proper Treatment of Venue and Choice of Law Issues Becomes Relevant Only Because Of The Supervening Fairness / Reasonableness Inquiry

Contrary to the way respondent has re-formulated Metlife's assertions in its petition, Metlife has not advocated the injection of venue issues into the baseline jurisdictional analysis. To the contrary, as Metlife has discussed before, extraneous issues, even those as important as First Amendment factors, must not enter into the due process analysis. ***Calder v. Jones***, 465 U.S. 783 (1984). In this regard however, it is important to clarify that Metlife also has questioned the use of a supervening reasonableness inquiry in the *general* jurisdiction context. It is only in the event that such a test is determined to be proper in *general* jurisdiction cases, that a variety of procedural devices, including among others, transfer of venue, appear to become relevant as means of ameliorating litigation fairness and reasonableness concerns. ***Burger King Corp. v. Rudzewicz,*** 471 U.S. 462, 477 (1985). Justice Brennan's opinion reiterated this concept in ***Burnham***, at p.639, n. 13. Metlife has asked the Court to discuss the appropriate use, if any, of such procedural devises in a *general* jurisdiction case, such as this one, where the case was dismissed below on the basis of secondary fairness / reasonableness factors. In this regard, instruction is needed on whether litigation convenience concerns, as well as a forum's lack interest in the dispute, should be ameliorated, if possible, through the use of change of venue. This is only important, however, if these factors are determined to be germane to *general* jurisdiction analysis. Robertson-Ceco again did not join issue with the petition in that it did not address in a substantive fashion ***Burger King's*** admonishment concerning the use of procedural devises to ameliorate the fairness / reasonableness concerns and the effect of a change of venue on those

concerns. The Court of Appeals weighed these factors in favor of Robertson-Ceco following an analysis which did not take into account potential alternate forums.

Related to this issue is Robertson-Ceco's mis-statement of Metlife's assertions relative to choice of law considerations, such as those pertaining to statutes of limitation. Metlife's position in the District Court and in the Court of Appeals was simply that courts should not base the dismissal of a case for want of jurisdiction on the fact that the case may be barred by statutes of limitation in other forums.[7] Again, it is only because of the use of a supervening reasonableness inquiry in the *general* jurisdiction context by the court below, that Metlife has pointed to the confusion and inconsistency in the cases as to whether the analysis of whether a plaintiff has an interest in a forum, should take into account that the case may be barred in any other relevant jurisdiction. It seems fundamentally disingenuous to suggest that a plaintiff is lacking in interest under such circumstances. This Court can reconcile the apparent inconsistency of excluding choice of law considerations from the jurisdiction analysis, yet simultaneously including in that due process analysis plaintiff oriented interests (which may depend vitally, as in this case, on choice of law considerations). This Court has the opportunity to resolve this confusion by first determining whether a supervening reasonableness test is appropriate in *general* jurisdiction due process analysis and then whether that test should be determined in part on the basis of the plaintiff's interests.

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[7] The District Court openly reproached Metlife for selecting the *Vermont* forum because of its favorable statute of limitations (App. 45a), just as *Robertson-Ceco* has done in nearly every brief it has submitted on the jurisdiction issue.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

By:_____

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